REACTIVE AND INCOMPLETELY THEORIZED STATE CONSTITUTIONAL DECISION-MAKING

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I. INTRODUCTION

By the late 1970s, United States Supreme Court Justice William J. Brennan, Jr., saw as numbered the days in which a majority of the Court would vote to generously interpret and apply the provisions of the Bill of Rights.[1] And so, in the pages of the *Harvard Law Review*, he urged individual rights proponents to view state constitutions as a source of protections that might extend beyond those contained in the Federal Constitution.[2] His essay heralded the modern age of independent state constitutionalism,[3] and, in the years since its publication, state courts in numerous decisions have invoked their sovereign authority to interpret and apply their states' constitutions to

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[1] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977).

[2] *Id.* Justice Brennan also advocated for enhanced protections under state constitutions in his dissenting opinions. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

[3] *See* Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 809 (2000) (noting that "[c]onventional wisdom attributes the genesis" of state constitutional movement to Justice Brennan's essay); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (declaring Justice Brennan's *Harvard Law Review* essay the "Magna Carta of state constitutional law").

protect individual rights and liberties more broadly than does the Federal Constitution.[4]

Many of these decisions can be viewed as reactive, with the state court content to announce disagreement with the Supreme Court's interpretation of the parallel provision of the Federal Constitution and to hold that the state constitution protects more broadly the individual right or liberty in question. These reactive decisions, aside from the result and perhaps a brief discussion of the federal case or cases with which there is disagreement, typically provide scant explanation for the result beyond a reference to such grand concepts as liberty, equality, or privacy, which the framers of the state constitution held dear.[5]

In *State v. Tanaka*,[6] for example, the Supreme Court of Hawaii considered whether the Hawaii Constitution allows warrantless searches of residential trash bags by government agents.[7] Those federal courts that had addressed the issue concluded that individuals have no expectation of privacy in their personal garbage under the Federal Constitution.[8] The Supreme Court of Hawaii, however, held to the contrary, ruling that an individual's expectation of privacy in closed trash bags was objectively reasonable.[9] The court announced this conclusion with little explanation, except to note that "the Hawaii Constitution

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[4] *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1017-18 (1997) (noting that commentators "have stopped counting" the number of cases in which state courts have sought to independently interpret the individual rights protections of their states' constitutions).

[5] *See* Lawrence Friedman & Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 127 (2001) ("Citation to a federal opinion . . . too often serves as a substitute for the considered reasoning that should accompany a particular interpretation of a state's constitution."). *See also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1991) (noting that the "terms and conventions" of state constitutionalism in individual rights cases "are often borrowed wholesale from federal constitutional discourse").

[6] 701 P.2d 1274 (Haw. 1985).

[7] *See id.* at 1276.

[8] *See, e.g.*, United States v. Vahalik, 606 F.2d 99, 101 (5th Cir. 1979), *cert. denied* 444 U.S. 1081 (1980). The Supreme Court of Hawaii considered *Tanaka* prior to the United States Supreme Court's ruling in *California v. Greenwood*, 486 U.S. 35 (1988), in which the Court held that "society would not accept as reasonable [a] claim to an expectation of privacy in trash left for collection in an area accessible to the public." *Id.* at 41.

[9] *Tanaka*, 701 P.2d at 1276.

recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights."[10]

Now, there is nothing inherently wrong with rejecting federal precedent in a case like *Tanaka*, and reactive decisions have received the support of commentators. Leigh A. Morrissey has argued that "no reason exists to consider reactive decisions less principled or legitimate" than any other state court decision rejecting a United States Supreme Court precedent.[11] And James Gardner has suggested that essentially reactive state court rulings on individual rights issues may check the Supreme Court's exercise of its power in respect to these issues when the state court highlights the flaws in the Court's interpretive logic and reasoning.[12]

Still, while reactive state constitutional decisions legitimately may counter national judicial power in the way that Gardner suggests, these decisions are problematic to the extent they lack completely theorized justifications for their holdings. A "completely theorized justification," as Cass Sunstein has explained, refers to the basis for the judicial exercise of interpretive judgment—it clarifies what led a court to conclude that a constitutional command has a particular meaning.[13] It encompasses as well the rationale underlying a court's explication of the doctrinal standards and rules with which a constitutional command will be applied in discrete cases.[14]

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[10] *Id.*

[11] Leigh A. Morrissey, *State Courts reject* Leon *on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND. L. REV. 917, 940 (1994).

[12] *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1033 (2003) (discussing the ways in which "[s]tate judicial rejection of excessively narrow Supreme Court precedents concerning the scope of individual rights helps check national power"); *cf.* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 125-26 (2000) (reasoning that the federal constitutional value of dialogue supports independent state constitutional decision-making in cases concerning individual rights issues settled under federal law).

[13] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 7-9 (1999). Such justifications might include, say, a concern to view individual rights protections as connected to the reinforcement of democratic processes. *See id.* at 7; *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[14] *See* RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 38 (2001) (distinguishing between the identification of constitutional norms and "crafting doctrine or developing standards of review").

Two distinct dispiriting effects follow from reactive state constitutional rulings that lack completely theorized rationales. First, from the perspective of constitutional discourse, a reactive and incompletely theorized decision is not likely to contribute meaningfully to the larger discourse about the extent and nature of the commitments contained in the "great ordinances" of the federal and state constitutions, those vague but essential constitutional provisions that secure individual rights protections like equality, due process, free expression, and the freedom from unreasonable searches and seizures.[15] Second, from the perspective of a state's constitutional jurisprudence, a reactive, incompletely theorized decision is likely to fail to supply judges, lawyers, government actors, and citizens with sufficient guidance to settle expectations about the bounds of those constitutional commitments.

In this article, I use state court consideration of the exclusionary rule's reach under state constitutional search and seizure provisions to illustrate the negative consequences of reactive and incompletely theorized state constitutional decisionmaking, and as a vehicle to suggest ways in which state courts may be persuaded to develop more completely theorized arguments to support the implementation of state constitutional individual rights protections. Part II begins with a review of the development of the exclusionary rule in the United States Supreme Court and in the state courts. The bulk of this part addresses the potential normative justifications for the understanding of the exclusionary rule that has prevailed in Pennsylvania and New Hampshire, where the high courts rejected deterrence as the principal rationale for the rule.

Part III focuses on the failure of state courts to articulate more complete justifications for rejecting a good faith exception to the exclusionary rule. I argue that these decisions fail to contribute substantively to the legal discourse among judges, lawyers, and commentators about individual rights and liberties common to both the federal and state constitutions. Further,

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[15] *See* Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) ("The great ordinances of the Constitution do not establish and divide fields of black and white.").

incompletely theorized decisions provide little guidance to citizens, government actors, judges, and lawyers about the state constitutional limits of government authority in respect to individual rights.

Part IV discusses the concerns that may underlie a jurisprudential preference for incompletely theorized decision-making at the federal level, and I argue that the normative importance of state court contributions to constitutional discourse and the practical need to provide guidance to state and private actors outweigh the force of these concerns in the state constitutional context. Finally, Part V turns to the likelihood of change in state court practice; here, I conclude that the potential for state constitutional individual rights decisions that are more completely theorized depends primarily upon the tenacity and thoughtfulness of the lawyers who argue these matters before state court judges.

II. THE EXCLUSIONARY RULE AND ITS RATIONALES

Because state courts have routinely addressed the question whether their state constitutions provide criminal defendants greater protection from unreasonable searches and seizures than does the United States Constitution,[16] the area of search and seizure provides an appropriate window through which to examine the consequences of incompletely theorized state constitutional rulemaking. I begin by reviewing the development of the exclusionary rule and the good faith exception to that rule in the United States Supreme Court before turning to the rejection of the good faith exception in Pennsylvania and New Hampshire

[16] The criminal defense bar has diligently pressed arguments that state constitutional individual rights protections exceed their counterparts in the Fourth, Fifth, and Sixth Amendments to the United States Constitution. *See, e.g.*, 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, at 11-2 (3d ed. 2000) ("The last three decades have seen an exponential increase in the number of opinions rendered by state supreme courts interpreting state constitutional prohibitions on unreasonable searches and seizures."); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1148-51 (1985) (discussing state court opportunities to rule on criminal issues); Herbert P. Wilkins, *The State Constitution Matters*, BOSTON B.J., Nov.-Dec. 2000, at 4, 15 (discussing development of search and seizure jurisprudence under the Massachusetts Constitution).

and the potential normative justifications for the differing understanding of the exclusionary rule in those jurisdictions.

A. The Exclusionary Rule

The federal exclusionary rule requires that, when a search or seizure of an individual is deemed by a court to have violated the doctrinal rules of the Fourth Amendment,[17] the evidence obtained as a result must be suppressed. The United States Supreme Court adopted the exclusionary rule in 1914, in *Weeks v. United States*.[18] The *Weeks* Court viewed the rule as a necessary corollary to the prohibition against unreasonable searches and seizures, reasoning that the Fourth Amendment's protections would be hollow if the federal government could make use of evidence it obtained unlawfully.[19]

In *United States v. Calandra*,[20] decided in 1974, the Court signaled a retreat from the assumption in *Weeks* that the exclusionary rule is a constitutional requirement. Considering whether illegally seized evidence could be presented to a grand jury, the *Calandra* Court concluded that the exclusionary rule does not serve to redress the injury to the privacy of the search victim; rather, "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[21] Because the purpose of the rule is to deter unlawful police conduct, the Court reasoned it should not be extended

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[17] The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " U.S. CONST. amend. IV.

[18] 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[19] *See id.* at 393-94. For the *Weeks* Court, moreover, the government included both the executive and judicial departments. *See id.* at 391-92 ("The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority . . . ."). The Court later extended the exclusionary rule, in *Mapp v. Ohio*, to apply in all state prosecutions, pursuant to the Fourteenth Amendment. *See* 367 U.S. 643, 655 (holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

[20] 414 U.S. 338 (1974).

[21] *Id.* at 347.

when the possible "incremental deterrent effect" is uncertain[22]—as the Court held it would be in the grand jury context.[23]

Calandra led to *United States v. Leon*,[24] decided in 1984. In *Leon*, the Court modified the exclusionary rule, in light of its deterrent purpose, to except searches conducted in good faith reliance on a search warrant that later proves to be defective.[25] The Court reasoned that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[26] In addition, the Court reaffirmed that the sole purpose of the exclusionary rule is to deter police misconduct—the rule is not a constitutionally required means of redressing an injury to the victim of an illegal search.[27]

Since *Leon*, the United States Supreme Court has applied the good faith exception in many circumstances in which law enforcement officers relied in good faith upon a warrant that later proved to be defective.[28] In *Leon*'s wake,[29] however, several state supreme courts rejected the argument that a good faith exception should apply to application of the exclusionary rule

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[22] *Id.* at 351 ("Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.").

[23] *See id.* at 354-55.

[24] 468 U.S. 897 (1984).

[25] *See id.* at 922.

[26] *Id.*

[27] *See id.* at 906 (the exclusionary rule was not designed to "cure" a Fourth Amendment violation).

[28] *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 1 (1995) (applying good faith exception when police officer relied in good faith upon erroneous police computer record).

[29] The United States Supreme Court's decision in *Leon* engendered no end of scholarly commentary and criticism. *See, e.g.*, Albert W. Alschuler, *"Close Enough for Government Work": The Exclusionary Rule After* Leon, 1984 SUP. CT. REV. 309 (criticizing *Leon* Court's estimation of costs and benefits of exclusionary rule); Robert M. Bloom, *Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 467-71 (1993) (criticizing turn in exclusionary rule jurisprudence toward deterrence rationale); Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986 143, 160-66 (Herman Schwartz ed., 1987) (discussing and criticizing narrowing of the exclusionary rule in *Calandra* and *Leon*); Wayne R. LaFave, *"The Seductive Call of Expediency"*: United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 (criticizing *Leon* Court for overstating costs of exclusionary rule and understating its benefits).

under state law.[30] The New York Court of Appeals declined to adopt the reasoning of *Leon* in 1985;[31] Michigan followed in 1986;[32] New Jersey in 1987;[33] North Carolina in 1988;[34] Connecticut in 1990;[35] Pennsylvania, Washington, and Vermont in 1991;[36] Idaho in 1992;[37] New Mexico in 1993;[38] New Hampshire in 1995;[39] and Alaska, Delaware, and Iowa in 2000.[40] Many of these rulings have been described as reactive decisions by commentators—as instances in which the state courts essentially based their rejection of the good faith exception upon a disagreement with the Court's reasoning in *Leon*.[41]

For purposes of discussing the limitations of incompletely theorized state constitutional decision-making, I focus on two cases: *Commonwealth v. Edmunds*, decided by the Supreme Court of Pennsylvania in 1991;[42] and *State v. Canelo*, decided by the New Hampshire Supreme Court in 1995.[43] In *Edmunds*, the

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[30] Additionally, many state courts have adopted a good faith exception under state law. *See, e.g.*, Jackson v. State, 722 S.W.2d 831, 834 (Ark. 1987); People v. Leftwich, 869 P.2d 1260, 1271-72 (Colo. 1994); State v. Huber, 704 P.2d 1004, 1011 (Kan. Ct. App. 1985); State v. Wilmoth, 490 N.E.2d 1236, 1238-39 (Ohio 1986); Hyde v. State, 769 P.2d 376, 380 (Wyo. 1989). Indeed, there is some evidence that, prior to *Leon*, state court judges had no enthusiasm for the exclusionary rule. *See, e.g.*, Bradley C. Canon, *Organizational Contumacy in the Transmission of Judicial Policies: The* Mapp*,* Escobedo*,* Miranda*, and* Gault *Cases*, 20 VILL. L. REV. 50, 61-76 (1974).

[31] People v. Bigelow, 488 N.E.2d 451, 458 (N.Y. 1985).

[32] People v. Sundling, 395 N.W.2d 308, 312-13 (Mich. Ct. App. 1986), *abrogated on other grounds by* People v. Russo, 497 N.W.2d 698 (Mich. 1992).

[33] State v. Novembrino, 519 A.2d 820, 857 (N.J. 1987).

[34] State v. Carter, 370 S.E.2d 553, 554 (N.C. 1988).

[35] State v. Marsala, 579 A.2d 58, 59 (Conn. 1990), *rev'd on other grounds*, 620 A.2d 1293 (Conn. 1993).

[36] Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991); State v. Crawley, 808 P.2d 773, 776 (Wash. Ct. App. 1991); State v. Oakes, 598 A.2d 119, 120 (Vt. 1991).

[37] State v. Guzman, 842 P.2d 660, 670-72 (Idaho 1992).

[38] State v. Gutierrez, 863 P.2d 1052, 1067-68 (N.M. 1993).

[39] State v. Canelo, 653 A.2d 1097, 1102 (N.H. 1995).

[40] Blank v. State, 3 P.3d 359, 370 (Alaska Ct. App. 2000), *rev'd on other grounds*, 90 P.3d 156 (Alaska 2004); Dorsey v. State, 761 A.2d 807, 817 (Del. 2000); State v. Cline, 617 N.W.2d 277, 278 (Iowa 2000), *abrogated on other grounds by* State v. Turner, 630 N.W.2d 601 (Iowa 2001).

[41] *See* Morrissey, *supra* note 10, at 934-37 (discussing state court rejections of good faith exception under state law through 1994); *see also* Matthew A. Nelson, Note, *An Appeal in Good Faith: Does the* Leon *Good Faith Exception to the Exclusionary Rule Apply in West Virginia?*, 105 W. VA. L. REV. 719, 748-51 (2003) (discussing state court rejections of good faith exception under state law through 2002).

[42] 586 A.2d 887 (Pa. 1991).

[43] 653 A.2d 1097 (N.H. 1995).

Supreme Court of Pennsylvania addressed whether Article I, Section 8 of the Pennsylvania Constitution[44] allows a good faith exception to the exclusionary rule.[45] Reviewing the history of Section 8, the court concluded that its framers intended that provision "to embody a strong notion of privacy,"[46] and that the exclusionary rule, rather than serving to deter police misconduct, had consistently been understood "to bolster the twin aims of Article I, Section 8; to wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause."[47] Given the importance of privacy as a constitutional value,[48] the Pennsylvania court held that "[c]itizens in this Commonwealth possess such rights [to privacy and to probable cause], even where a police officer in 'good faith' carrying out his or her duties inadvertently invades [an individual's] privacy or circumvents the strictures of probable cause."[49] Under the Pennsylvania Constitution, the court viewed the rights to privacy, and to probable cause as a prerequisite to a valid search, as superior to any policy considerations promoted by a good faith exception to the exclusionary rule.[50]

The New Hampshire Supreme Court addressed the good faith exception in *Canelo*.[51] In considering whether to adopt the good faith exception, the court reviewed the history of the state constitutional protection against unreasonable searches and seizures under Part I, Article 19 of the New Hampshire Consti-

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[44] Article I, Section 8 states in relevant part: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures . . . ." PA. CONST. art. I, § 8.

[45] *Edmunds*, 586 A.2d at 891.

[46] *Id.* at 897. *See also id.* at 898 ("The right to be free from unreasonable searches and seizures . . . is tied into the implicit right to privacy in th[e] Commonwealth (quoting Commonwealth v. DeJohn, 403 A.2d 1283, 1291 (Pa. 1979))).

[47] *Id.* at 899.

[48] In the view of one commentator, the Pennsylvania courts have concluded they must interpret Article I, Section 8 to "give more weight to the demands of individual privacy than the federal courts give in parallel circumstances." Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, *in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES § 33.2, at 787 (Ken Gormley ed., 2004).

[49] *Edmunds*, 586 A.2d at 899. The court accordingly reasoned that "the good faith exception to the exclusionary rule would directly clash with those rights of citizens as developed in [the] Commonwealth over the past 200 years." *Id.* at 901.

[50] *See id.* at 904 (noting that "the underlying premise of *Leon* is still open to serious debate").

[51] State v. Canelo, 653 A.2d 1097 (N.H. 1995).

tution[52] and the policies animating the various aspects of the state's search and seizure jurisprudence.[53] The court recognized that Part I, Article 19 "safeguards privacy and protection from government intrusion" and "manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization."[54] The court regarded the preference for privacy as a paramount concern and sufficient reason to reject the rationale of *Leon*:

> The exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement of part I, article 19. Enforcement of the rule places the parties in the position they would have been in had there been . . . no violation of the defendant's constitutional right to be free of searches [and seizures] made pursuant to warrants issued without probable cause. In so doing, the rule also preserves the integrity of the judiciary and the warrant issuing process.[55]

The court accordingly rejected a good faith exception as "incompatible with and detrimental to . . . citizens' strong right of privacy inherent in part I, article 19 and the prohibition against the issuance of warrants without probable cause."[56]

B. Exclusionary Rule Rationales

The exclusionary rule is one means by which the constitutional protection against unreasonable searches and seizures may be effectuated, and the way in which the exclusionary rule is applied in turn may be supported by multiple rationales. The United States Supreme Court, following a pragmatic approach that emphasizes instrumental goals and the lessons of experi-

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[52] Part I, Article 19 states in relevant part: "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. CONST. pt. I, art. 19.

[53] *See Canelo*, 653 A.2d at 1103-04.

[54] *Id.* at 1104-05.

[55] *Id.* at 1105 (alteration in original) (citations and quotation marks omitted).

[56] *Id.*

ence,[57] confirmed in *Calandra* that deterrence is the exclusive rationale for the federal exclusionary rule, and it adopted the good faith exception in *Leon* because excluding evidence seized in good faith reliance upon a defective warrant would not, in the Court's view, enhance the rule's deterrent effect.[58] In contrast, both the Supreme Court of Pennsylvania in *Edmunds* and the New Hampshire Supreme Court in *Canelo* rejected deterrence as the primary rationale for the exclusionary rule.[59]

Both the *Edmunds* and *Canelo* courts adverted to privacy and the probable cause requirement in rejecting a good faith exception to the exclusionary rule. But privacy and respect for the probable cause requirement do not, in themselves, supply a fully theorized justification for rejecting the exception. The United States Supreme Court, after all, is not unconcerned with privacy, broadly understood as the right to be free from unreasonable searches and seizures by government agents. Rather, the Court views an exclusionary rule premised upon deterrence of illegal conduct by government officials as the best means by which to protect legitimate privacy interests in light of the state's obligation to detect and punish criminal acts.[60] In this section, I review four alternative justifications for the exclusionary rule—institutional compliance, judicial integrity, separation of powers, and the expressive rationale for the exclusionary rule—and the extent to which the Pennsylvania and New Hampshire courts relied upon any of them in support of their understanding of the rule.

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[57] *See* RICHARD A. POSNER, OVERCOMING LAW 4-15 (1995) (discussing pragmatism and pragmatic approach in law).

[58] *See supra* notes 23-26 and accompanying text (discussing *Leon* and the United States Supreme Court's adoption of the good faith exception).

[59] *See Canelo*, 653 A.2d at 1105 (stating that deterrence of police misconduct is not "the rule's sole purpose"); *Commonwealth v. Edmunds*, 586 A.2d 887, 898 (Pa. 1991) (discussing Pennsylvania rule as "unshakably linked to a right of privacy" rather than to deterrence of police misconduct).

[60] *See* Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006) (noting that the exclusionary rule should be employed only to "vindicate" a person's entitlement to shield information from the government when the police conduct a warrantless search). See Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33 (2005), on the ascendancy of privacy theory in Fourth Amendment jurisprudence.

1. Institutional Compliance

Justice Brennan, in his dissent in *Leon*, argued that, even assuming deterrence provides the best rationale for the exclusionary rule, the majority had misunderstood the kind of deterrent effect the rule might have.[61] According to Justice Brennan, the *Leon* majority saw the rule as a means to deter individual officers from conducting illegal searches, by creating an incentive system whereby individual officers would essentially be "punished," through the exclusion of evidence at trial, when they failed to adhere to the Fourth Amendment's dictates.[62] Justice Brennan, on the other hand, saw "the chief deterrent function of the rule" as "its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally."[63] Operation of the exclusionary rule, in other words, would create incentives for the government to prevent illegal searches and seizures at the organizational level, and that "overall educational effect" should be considered in calculating the costs and benefits of applying the exclusionary rule in a given instance.[64]

The *Edmunds* court flatly rejected any reliance upon deterrence as a basis for the exclusionary rule under Article I, Section 8 of the Pennsylvania Constitution.[65] The New Hampshire Supreme Court, by contrast, acknowledged in *Canelo* that deterrence of police misconduct remains an aim of the exclusionary rule.[66] Nonetheless, the decision does not suggest that the court embraced Justice Brennan's larger conception of deterrence—that is, of an exclusionary rule aimed at creating institutional compliance with the prohibition on unreasonable searches and seizures. Nor did the court factor the possibility of encouraging that kind of deterrence into its reasoning, which focused on redressing the privacy injury suffered by the victim of an unconstitutional search.[67]

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61 *See* United States v. Leon, 468 U.S. 897, 952 (1984) (Brennan, J., dissenting).
62 *See id.* at 952-53.
63 *Id.* at 953.
64 *See id.* at 955.
65 *See* Commonwealth v. Edmunds, 586 A.2d 887, 899 (Pa. 1991).
66 *See* State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995).
67 *Id.*

2. Judicial Integrity

Next, there is the argument that the interest in protecting judicial integrity animates the exclusionary rule. In *Weeks v. United States*,[68] the United States Supreme Court adopted the exclusionary rule as a bar to the admission in federal courts of evidence illegally obtained by the government.[69] The Court stated that, to sanction the admission of illegally seized items into evidence "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[70] Some forty-six years later, in *Elkins v. United States*,[71] the Court expressed concern for "the imperative of judicial integrity" and denounced circumstances in which judges might participate in the use of illegally obtained evidence.[72] But, in 1965, just a few years after *Elkins*, the Court announced deterrence as the central justification for the exclusionary rule.[73] There followed *United States v. Calandra*,[74] in which the Court held that the exclusionary rule's "prime purpose is to deter future unlawful police conduct."[75]

In his dissenting opinion in *Calandra*, Justice Brennan gave voice to the argument for judicial integrity and the implications of a commitment to judicial integrity as a justification for the exclusionary rule. He believed the deterrence rationale to be inconsistent with the intent of the Framers of the United States Constitution.[76] The Framers, he argued, had in mind a system of government in which official conduct would be cir-

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[68] 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[69] *Id.* at 392.

[70] *Id.* at 394.

[71] 364 U.S. 206 (1960).

[72] *Id.* at 222. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court reiterated a concern for "the imperative of judicial integrity," reasoning that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659.

[73] Linkletter v. Walker, 381 U.S. 618, 637 (1965) (declining to apply *Mapp* retroactively because purpose of exclusionary rule is to deter future misconduct).

[74] 414 U.S. 338 (1973) (declining to apply exclusionary rule in grand jury proceedings). *See also supra* notes 20-22 and accompanying text.

[75] *Calandra*, 414 U.S. at 347.

[76] *Id.* at 356 (Brennan, J., dissenting).

cumscribed by legal limits, a system that would require an enforcement mechanism:

> [T]he enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people-all potential victims of unlawful government conduct-that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.[77]

For the Fourth Amendment to retain its relevance, the courts would need to avoid even the appearance of acquiescing to illegal government action; in Justice Brennan's view, the exclusionary rule served to keep the judiciary from the "taint of partnership in official lawlessness."[78]

The *Edmunds* court did not base its rejection of the good faith exception upon the judicial integrity rationale; in fact, the court made no mention of it. And, while the New Hampshire Supreme Court in *Canelo* noted judicial integrity as an additional reason for rejecting the good faith exception to the exclusionary rule,[79] it is not clear how seriously the court believed

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[77] *Id.* at 357.

[78] *Id.* The judicial integrity rationale has not been immune from criticism. *See, e.g.*, Commonwealth v. DeJohn, 403 A.2d 1283, 1298 (Pa. 1979) (Larsen, J., concurring in part and dissenting in part) (noting that laymen find "the judicial integrity rationale[] difficult to grasp, and many lawyers think the highest integrity of the adjudicative aspect of the criminal process lies in the separation of the guilty from the innocent on the basis of all the relevant evidence available" (quoting Carl McGowan, *Rule Making and the Police*, 70 MICH. L. REV. 659, 674 (1972))). The Supreme Court itself opined, in *Stone v. Powell*, 428 U.S. 465 (1976), that the judicial integrity rationale might logically become an impediment to the admission of illegally obtained evidence when a defendant fails to object—in such an instance, the Court would be party to the use of the fruit of the government's conduct. *Id*. at 485 (concern for integrity of the judicial process "has limited force as a justification for the exclusion of highly probative evidence"). Indeed, the Court went so far as to suggest that, contrary to the opinion in *Weeks*, judicial integrity might be compromised when a court allows the suppression of inculpatory evidence, and thereby contributes to the release of a person arguably guilty. *See id.* at 490.

[79] State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995) ("Enforcement of the rule places the parties in the position they would have been in had there been . . . no violation of the defendant's constitutional right to be free of searches [and seizures] made pursuant to warrants issued without probable cause. . . . In so doing, the rule also preserves the integrity of the judiciary and the warrant issuing process." (alteration in original) (citation omitted)).

judicial integrity to be an essential justification for the exclusionary rule. The court did not elaborate on judicial integrity as a constitutional matter, as opposed to a judicial policy, and the bulk of the *Canelo* opinion addressing the reasons for the exclusionary rule is concerned with the way in which the exclusionary rule redresses the "injury to the privacy of the search victim," thereby protecting New Hampshire citizens' "strong right of privacy."[80] It seems reasonable to conclude, then, that, as with institutional compliance, judicial integrity was not a principal justification for the exclusionary rule under the New Hampshire Constitution.

3. Separation of Powers

A third justification for the exclusionary rule flows from separation of powers principles. This argument has appeared in two forms. The first, advanced by Timothy Lynch, suggests that the exclusionary rule is a component of the separation of powers, and provides the means by which the judiciary can monitor and check the executive's power to undertake searches and seizures.[81] The second, advanced by Thomas S. Schrock and Robert C. Welsh some thirty years ago, suggests that the exclusionary rule is simply judicial review by another name.[82]

Lynch sought to justify the exclusionary rule by relying upon the structural separation of powers in the United States Constitution between the legislative, executive, and judicial departments, a separation premised on the belief that such structural divisions serve to check and balance the power of each department.[83] In respect to the power of the government to search and to seize, the Fourth Amendment indicates that the judiciary has the authority to control and supervise the search warrant process when that process is initiated by the executive; in

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[80] *See id.* at 1105. Subsequent decisions of the New Hampshire Supreme Court, moreover, have not expanded on the judicial integrity rationale. *See infra* notes 136-48 and accompanying text.

[81] *See* Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711 (2000).

[82] *See* Thomas S. Schrock & Robert C. Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975).

[83] Lynch, *supra* note 81, at 716.

Lynch's view, the amendment "manifests a preference for a procedure of antecedent justification that the police must follow before they can invade American homes or businesses."[84]

If this is the case, then the exclusionary rule necessarily complements the principle of antecedent justification, for "[e]nforcement of the rule puts executive branch agents in the position they would have been in had no violation of the warrant clause [of the Fourth Amendment] occurred. Thus, the exclusionary rule restores the equilibrium that the Fourth Amendment established."[85] The exclusionary rule, in other words, allows the judiciary to protect its constitutional authority over the warrant process; that process would be ineffective, and the executive would remain unchecked, if the courts simply allowed agents of the executive to circumvent the strictures of the Fourth Amendment.[86] On this understanding, moreover, the question of the costs and benefits of the exclusionary rule is irrelevant, because "the president and Congress are not at liberty to conduct a cost-benefit analysis of constitutional guarantees and then adjust the meaning of those guarantees to comport with their findings."[87]

The second version of the separation of powers argument posits the exclusionary rule as a manifestation of judicial review. The argument suggests the courts are obligated under *Marbury v. Madison*[88] to review governmental conduct alleged to be illegal under the Constitution:

> [The defendant] has a right to have the court sitting in his case consult the Constitution when executive conduct related to his case is challenged under any of its parts. And when search and seizure conduct is successfully challenged as unreasonable, he has a due process right to exclusion of the disputed evidence, because exclusion is the only concrete expression which ad-

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[84] *Id.* at 738.

[85] *Id.* at 739.

[86] *See id.* at 715-16 ("The most opportune time to check . . . unconstitutional behavior is when lawyers for the executive branch (prosecutors) attempt to introduce illegally seized evidence in court.").

[87] *Id.* at 747 (citing Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting)).

[88] 5 U.S. (1 Cranch) 137 (1803).

> verse judicial review of unreasonable search and seizure can take.[89]

In other words, the exclusionary rule is simply what we call judicial review in the search and seizure context; as Schrock and Welsh put it:

> [W]hether it be Congress abridging the freedom of speech or police officers making unreasonable searches and seizures, the fact is that governmental actors are doing something repugnant to the Constitution, and in each case the courts are being asked to cooperate and therefore condone that repugnant act. What is at stake in each case is the meaningfulness of the Constitution; the tendency of judicial acceptance of either kind of act is to make the Constitution meaningless.[90]

On this view, a court should decline to adopt the good faith exception because it would be incompatible with the judicial responsibility to review government conduct and, if that conduct were found wanting under constitutional standards, invalidate it.[91]

The court in *Edmunds* appeared to ground its rejection of the good faith exception in the exception's incompatibility with the warrant-issuing process and, specifically, the probable cause requirement. The court stated that the exclusionary rule serves to ensure "that warrants shall only be issued upon probable cause,"[92] and a citizen's search and seizure rights ought to obtain even when a law enforcement officer inadvertently "circumvents the strictures of probable cause."[93] Though this language lends support to the argument that the court endorsed a separation of powers rationale for the exclusionary rule, the court at the same time viewed the probable cause requirement as the means by which individual privacy may be protected, tying it directly to "the implicit right to privacy" enjoyed by Penn-

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[89] Schrock & Welsh, *supra* note 82, at 309.

[90] *Id.* at 347.

[91] *See id.* at 374 (observing that the constitutional exclusionary right reflects the rule of law, "and that for a court to admit unconstitutionally obtained evidence is to do violence to the *concept* of the rule of law").

[92] Commonwealth v. Edmunds, 586 A.2d 887, 899 (Pa. 1991).

[93] *Id.*

sylvania citizens.[94] Indeed, the court concluded, following a historical review, that the Framers of Article I, Section 8, designed the warrant-issuing process to protect the "paramount concern for privacy," and not to permit the judiciary to monitor executive conduct per se.[95]

Further, while the *Edmunds* court's view of the exclusionary rule is not necessarily incompatible with an understanding of the rule as a species of judicial review, there is no indication in *Edmunds* that the court saw the exclusionary rule as simply an unremarkable instance of judicial review of government conduct. Besides the court's focus on individual privacy as the provision's "paramount concern," the discussion in the opinion of the various policy arguments associated with the exclusionary rule and the good faith exception makes no mention of the rule as a manifestation of judicial review.[96] This failure is notable, for the judicial review rationale, premised not upon individual privacy but institutional authority, would have raised a high bar to the contention that judicial review should be relaxed in the face of utilitarian determinations relating to the perceived "costs" of the exclusionary rule.[97]

Similarly, the New Hampshire Supreme Court's opinion in *Canelo* does not seem to endorse either version of the separation of powers argument. Rather, the court expressed a preference for understanding the exclusionary rule as connected to a constitutional "preference for privacy."[98] The court viewed preservation of the "warrant issuing process" as another purpose of the exclusionary rule,[99] but it seems clear that, as in *Edmunds*, it is not the ability of the judiciary to control the warrant-issuing process that concerned the court, but, rather, the way in

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[94] *Id.* at 898 (quoting Commonwealth v. DeJohn, 403 A.2d 1283, 1291 (Pa. 1979)).

[95] *Id.* at 897. *See also id.* at 899 (construing the probable cause requirement as "designed to protect us from unwarranted and even vindictive incursions upon our privacy")).

[96] *See id.* at 901-05 (discussing policy considerations raised by the good faith exception to the exclusionary rule).

[97] *See* Schrock & Welsh, *supra* note 82, at 347 (in the exclusionary rule context, when government action offends any provision of the Constitution, "[w]hat is at stake in each case is the meaningfulness of the Constitution").

[98] State v. Canelo, 653 A.2d 1097, 1104 (N.H. 1995).

[99] *Id.* at 1105.

which the probable cause and warrant requirements serve to vindicate individual privacy interests.[100] In addition, like the Pennsylvania court in *Edmunds*, the court in *Canelo* made no mention of the judicial review rationale as a justification for the exclusionary rule and rejection of the good faith exception.[101]

4. The Expressive Rationale

Neither the Pennsylvania nor the New Hampshire court proffered an explanation of just what kind of "privacy" their respective constitutions protect, or what a constitutional commitment to the probable cause requirement might mean for privacy.[102] But some form of individual privacy is plainly the interest that both courts sought to vindicate in rejecting the good faith exception to the exclusionary rule. Privacy, as noted above,[103] does not necessarily provide a rationale for applying the exclusionary rule in a particular way, but given the stated concern in both *Edmunds* and *Canelo* to protect privacy a fourth justification for the exclusionary rule and the concomitant rejection of a good faith exception presents itself: the expressive rationale.[104]

a. The Expressive Dimension of the Protection Against Unreasonable Searches and Seizures

The expressive rationale is based on the notion that the meaning of conduct may be different from, but as significant as, the ends that an actor seeks to achieve through her actions. Conduct, in other words, can violate important governing norms not only by creating concrete costs—which would be the concern

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[100] *Id.* (stating that "[t]he exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement").

[101] *Id.* (discussing justifications for the exclusionary rule under New Hampshire law).

[102] *See id.* at 1105.

[103] *See supra* note 100 and accompanying text (discussing relationship between privacy and the exclusionary rule).

[104] I address below the consequences of the courts' respective failures to explicate the reasoning underlying the decisions. *See infra* notes 130-50 and accompanying text. Commentators have pointed out that judicial decisions "often cloak expressive considerations in non-expressive terms." Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532 (2000).

of a deterrence rationale—but by conveying a meaning that expresses inappropriate respect for an established societal norm of behavior.[105] When an actor, through her conduct, disrespects a societal norm, she conveys an incorrect valuation of an interest that governing norms dictate should be regarded in a particular way; the result is an expressive harm.[106] The expressive approach to law requires that expressive harm be answered through public correction of the actor's otherwise incorrect valuation of the interest at issue.[107] Such correction may be declared in the course of, or as a result of, litigation.[108]

Consider a case in which the defendant is alleged to have committed a theft. The conviction by a jury of the defendant upon proof beyond a reasonable doubt answers publicly the thief's incorrect valuation of the victim's interest in the possession and control of her property: the verdict of guilt negates the defendant's incorrect valuation of the victim's interests, as defined by the governing norms in the criminal law.[109] In this way, the public declaration of criminal liability serves to emphasize for the community the standards for appropriate behavior—in the case of theft, how members of the community ought to properly value a person's interest in the possession and control of her property.[110]

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[105] *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998). Law in its various forms is a touchstone of those governing norms that demand respect; the law in this way serves to define appropriate standards of conduct. *See id.*

[106] *See* Anderson & Pildes, *supra* note 104, at 1527.

[107] *See* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98-101 (1970); *see also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (observing that a criminal conviction represents "a formal and solemn pronouncement of the moral condemnation of the community"); Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 493 (2001) (noting that expressive theories of law "prescribe expressing forms of . . . moral emotions, consistent with respect for the persons who are affected by [those emotions]").

[108] Judicial condemnation of expressive harm serves "to ensure that political and social relationships remain constituted according to the principles previously thought to govern them." Anderson & Pildes, *supra* note 104, at 1529.

[109] *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597-98 (1996) (discussing expressive dimensions of theft).

[110] *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351-52 (1996) (discussing the importance of asserting the standards by which persons and goods properly should be valued).

Privacy is accepted as an important individual interest, respect for which is advanced through a variety of governing norms. Those norms encompass both decision privacy and information privacy. Decision privacy concerns the ability of autonomous individuals to make important decisions about their lives absent interference from the government.[111] Information privacy, on the other hand, relates to the control individuals have over access to, and the dissemination of, information about themselves and their various activities.[112]

The protection against unreasonable searches and seizures expresses the value that attaches to information privacy as against the government's desire to obtain information—the significance the Framers assigned to an individual's ability to keep personal information from agents of the state.[113] When those agents conduct searches without probable cause, or based upon faulty warrants, their actions express disrespect for the search

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[111] *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (discussing individual's privacy interest "in independence in making certain kinds of important decisions"); Paul v. Davis, 424 U.S. 693, 713 (1976) (noting decision privacy interest in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education"). *See also* Michael J. O'Donnell, *Reading for Terrorism: Section 215 of the USA PATRIOT Act and the Constitutional Right to Information Privacy*, 31 J. LEGIS. 45, 49 (2004) (discussing *Whalen* and the distinction between decision privacy and information privacy).

[112] *See* ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) (defining information privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203 (1998) (describing "information privacy" as concerned with "an individual's control over the processing—i.e., the acquisition, disclosure, and use—of personal information").

[113] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (reasoning that the protection against unreasonable searches and seizures protects Americans "in their beliefs, their thoughts, their emotions and their sensations"); JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 75 (1997) (discussing Fourth Amendment privacy as "characterized as control over information about oneself"); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 47 (1966) (suggesting that the core concern of the protection against unreasonable searches and seizures is "the privacy of home and person . . . against the long reach of government"); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM & MARY L. REV. 197, 229 (1993) (concluding that "the broad principle" established by the Fourth Amendment "is that discretionary police power implicating [privacy] interests cannot be trusted"). See ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006), on the expressive aspects of the Fourth Amendment and Fourth Amendment analysis.

victim's privacy interest; the unconstitutional search conveys the message that, notwithstanding the constitutional commitment to protection of that interest, the government simply can disregard the established rules that limit its authority to intrude upon privacy.[114] In the face of such disrespect, the exclusionary rule serves to vindicate publicly the search victim's privacy interest: it represents the means by which the community, speaking through the judiciary, answers the government's incorrect valuation of privacy.[115]

A court declares that incorrect valuation through a finding that the government acted contrary to the demands of the protection against unreasonable searches and seizures, together with a decree that the information seized must be suppressed at trial. In this way, the parties are returned to the approximate positions they occupied before the illegal search or seizure occurred.[116] A return to the status quo ante satisfies the expressive rationale because it both recognizes the expressive injury and reaffirms "the underlying normative principles for how the relevant relationships"—in this instance, the relationship between government and citizen—"are to be constituted."[117]

The language of the *Edmunds* and *Canelo* decisions suggests that each court's understanding of the exclusionary rule and rejection of a good faith exception finds plausible support in the expressive rationale. The court in *Edmunds* held "the exclusionary rule in Pennsylvania . . . serve[s] to bolster the twin aims of Article I, Section 8; to-wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be

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[114] *Cf.* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 564 (2006) (discussing capacity of police misconduct to send "demeaning messages about human worth via morally inappropriate [conduct]").

[115] *See* TASLITZ, *supra* note 113, at 65-66 ("The exclusionary rule empowers the judge not simply to give the defendant personally but to give the People as a whole the political benefit to which the Fourth Amendment's substance entitles them.").

[116] *See* Stringer v. State, 491 So. 2d 837, 850 (Miss. 1986) (Robertson, J., concurring) (the exclusionary rule "places the parties in the position they would have been in had there been . . . no [constitutional] violation").

[117] Anderson & Pildes, *supra* note 104, at 1529. The return is necessarily imperfect, of course, for privacy once breached cannot be fully restored—the search victim will never again have the same control over the information illegally obtained by the government.

issued upon probable cause."[118] The court ruled information privacy to be an individual interest of constitutional dimension, one which ought to prevail regardless whether government agents invade it deliberately or inadvertently.[119] The court reasoned, in other words, that individuals suffer an expressive harm to their information privacy interest whether or not government agents acted in good faith when conducting a search: the expressive harm that results is the same in both encounters, and can be redressed only by the public declaration of redress—a suppression order—that follows from the operation of the exclusionary rule.

The New Hampshire Supreme Court in *Canelo* concluded "[t]he exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance [with the constitution]."[120] The "injury to privacy" suffered by the search victim is the expressive harm, and the court endorsed the public correction of that injury via a judicial finding, after a hearing on a motion to suppress, that the government in searching the defendant acted without constitutional authorization.[121] The court's conclusion that the good faith exception would be "incompatible with and detrimental to [a] citizens' strong right of privacy"[122] acknowledges that, no matter how the government invades an individual's privacy, redress can be adequately accomplished only by operation of the exclusionary rule; the rule enables the courts to "guard compliance" with the constitutional commitment to privacy by reaffirming what that compliance requires of the government.[123]

The expressive rationale offers an explanation for the reasoning and the results in both *Edmunds* and *Canelo*. It also explains why these courts did not consider alternative remedies for the injury to the search victim's privacy. The courts might,

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[118] Commonwealth v. Edmonds, 586 A.2d 887, 899 (Pa. 1991).

[119] *See id.*

[120] State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995).

[121] *Id.* at 1099.

[122] *Id.* at 1105.

[123] The exclusionary rule may also have the incidental effect of deterring future police misconduct, but such deterrence would simply be an additional benefit of the rule. That is to say, aside from any actual deterrent effect, the injury to privacy suffered by the search victim could be redressed only through the operation of the exclusionary rule.

for example, have allowed the admission of wrongfully seized evidence while urging the creation of a civil remedy against the government for unconstitutional searches and seizures.[124] But such a remedy would not satisfy the expressive rationale in the same way as suppression, for it would essentially commodify an individual's privacy interest: to allow a search victim to pursue damages as a recourse undermines the value of her information privacy by suggesting that the government can disrespect that interest by paying—literally—the cost of doing so.[125] Information privacy would be respected only to the extent of a valuation by a judge or jury, and correction of the government's erroneous valuation of an individual's privacy would hang on a contingency—on the possibility of a favorable outcome in a subsequent action for damages. That possibility could not sufficiently answer the government's initial showing of disrespect for the search victim's privacy, because, while it might address some material harm, it would not formally recognize the loss of control over information she once validly possessed.[126]

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[124] *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting) (proposing, to replace the suppression of evidence at trial, a remedial scheme that would allow search victims to seek compensation from the government for the constitutional violation); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 40-43 (1997) (arguing for compensatory regimes premised upon government liability for unconstitutional searches and seizures).

[125] As Walter Dellinger has explained:

> To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices. In the absence of the exclusionary rule, the law enforcement officer and the public generally are enticed to view the Constitution as Justice Holmes' "bad man" viewed the obligation of contracts. However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way.

Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) (footnote omitted).

[126] *See* Anderson & Pildes, *supra* note 104, at 1539-40 (distinguishing between material and expressive harms in the equal protection context and concluding that different means of addressing an issue can produce different understandings for expressive purposes). Further, to prefer that individuals essentially "sell" their information privacy through a damages assessment after a civil proceeding would imperil the information privacy of all; values like information privacy cannot be commodified in one instance without having the effect of commodifying them—or at least undermining them—in other circumstances. *Cf.* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 165

Nor could the expressive rationale support correction of the government's failure to respect an individual's information privacy through a judicial finding of illegality, but without an order declaring the suppression of the seized items. On this argument, the illegally seized information would not necessarily be suppressed at trial in view of the public interest in the admission of inculpatory evidence at the criminal trial of the search victim.[127] But the proper vindication of an individual's privacy interest entails more than just a finding that the government disrespected privacy; it also requires that the search victim be returned to the approximate position in relation to the government that she occupied before the illegal search or seizure, as noted above.[128] Absent that realignment of interests, the judicial declaration of the expressive harm and reaffirmation of the proper relationship between individuals and the government would ring hollow.[129]

Simply put, the expressive rationale requires that public condemnation of the government's disregard for the search victim's privacy be complete, to restore that interest to its appropriate valuation in a public way. This is so not just because of the search victim's personal privacy interest, but because it is important to affirm the level of respect the government should accord every individual's interest in his or her information privacy. To hold otherwise—for example, by adopting a good faith exception to the exclusionary rule—would be to suggest that the information privacy norm embraced by the protection against unreasonable searches and seizures has less weight than other constitutional interests.

(1993) (arguing that allowing certain goods to be freely alienated undermines collective autonomy and "self-protection"); *see generally* Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843 (2002).

[127] *See* Laurence Naughton, Note, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 207 (1996) (discussing public dissatisfaction with the effect of the exclusionary rule).

[128] *See supra* notes 113-17 and accompanying text (discussing exclusionary rule as expressive remedy).

[129] *See* Anderson & Pildes, *supra* note 104, at 1529 (expressive remedies matter "because they express recognition of injury and reaffirmation of the underlying normative principles for how the relevant relationships are to be constituted").

b. After Edmunds *and* Canelo

If the *Edmunds* and *Canelo* courts had in mind a justification for the operation of the exclusionary rule under the Pennsylvania and New Hampshire Constitutions and the rejection of the good faith exception that runs deeper than mere disagreement with the *Leon* Court's conclusion, the expressive rationale would seem the most likely candidate. It remains to test this hypothesis. I do so in this section by looking at the ways in which the Pennsylvania and New Hampshire courts have construed and applied the reasoning of *Edmunds* and *Canelo*. How the courts in subsequent cases have viewed *Edmunds* and *Canelo* gives us some indication of just what the courts in those cases had in mind when they rejected *Leon*.

More than ten years after *Edmunds*, the Supreme Court of Pennsylvania in *Commonwealth v. Hughes*[130] addressed the question whether, consistent with Article I, Section 8 of the Pennsylvania Constitution, a search should be deemed "valid [when the investigating] officer is reasonably mistaken as to the actual authority of the party that consented to his entry into the premises."[131] The case raised the issue of a third party's "authority" to consent to a search, and what steps the police must take to determine whether that third party had sufficient authority to consent; the existence of such authority, the court concluded, serves to exempt law enforcement from the ordinary requirements of probable cause and a warrant.[132]

The *Hughes* court reasoned that, while "[t]he adoption of the good faith exception would have been inconsistent with . . . the heightened expectation of privacy" that Pennsylvania citizens enjoy, an apparent authority exception to the warrant requirement would not undermine that expectation.[133] Indeed, the court stated that inculpatory evidence would be admissible even

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[130] 836 A.2d 893 (Pa. 2003).

[131] *Id.* at 901.

[132] *Id.* at 902-03.

[133] *Id.* at 902 (quotation marks omitted). The United States Supreme Court explicated the "apparent authority exception" to the warrant requirement under the Fourth Amendment in *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The *Hughes* court took comfort in the number of state court decisions that have adopted the reasoning of *Rodriguez* under their state constitutions. *Hughes*, 836 A.2d at 903.

when police officers mistakenly relied upon the consent of a third party who is later shown not to have had the authority to consent to the search.[134] Further, the police need inquire into the basis of a party's authority to consent to a search only when "the situation is ambiguous and would cause a reasonable person to question the authority of the party who gave consent," or when that person's authority "appears to be unreasonable."[135]

Hughes undermines the conclusion that the expressive rationale best explains the Pennsylvania court's understanding of Article I, Section 8's protection of individual privacy. Adherence to *Edmunds* would have required a stricter standard to govern the procedures the police must follow in determining whether a third party had the appropriate authority to give consent to search: if the government by its actions in *Edmunds*—the execution, in good faith, of an unsupported search warrant—expresses disrespect for the privacy of the search victim, it is not clear why it should suffice that government officers in good faith accept a third party's assertion of authority without some specific inquiry into the basis for that assertion.[136] The failure specifically to inquire into the third party's claimed authority would seem to show a corresponding disrespect for the search victim, by eliding the very consideration that the *Edmunds* court viewed as paramount to an analysis of the protection against unreasonable searches and seizures in the context of good faith reliance upon a warrant: actual rather than simply perceived authorization to search.

A similar puzzle presents itself in New Hampshire. In a case decided half a decade after *Canelo*, *Lopez v. Director, New Hampshire Division of Motor Vehicles*,[137] the New Hampshire Supreme Court addressed the question whether the exclusion-

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[134] *See Hughes*, 836 A.2d at 903 ("When police officers obtain the voluntary consent of a third party, who has the authority to give consent, they are not required to obtain a search warrant based on probable cause.").

[135] *Id.*

[136] As Chief Justice Ralph J. Cappy—author of the *Edmunds* decision—argued in his *Hughes* dissent, before the apparent authority exception is invoked, police officers must obtain "unequivocal, specific, and voluntary consent to search the premises." 836 A.2d at 908 (Cappy, C.J., dissenting).

[137] 761 A.2d 448 (N.H. 2000).

ary rule applies to driver's license revocation proceedings.[138] Lopez had been arrested for driving while intoxicated, and the state suspended his license because he had refused to submit to a blood alcohol test.[139] The hearing officer upheld the suspension, but Lopez appealed to the trial court, which concluded, first, that an underlying basis for a license suspension—in this case, the stop of Lopez's vehicle—must be constitutionally valid, and, second, that the exclusionary rule extends to license revocation proceedings.[140] The lower court found the stop invalid and, applying the exclusionary rule, vacated the suspension.[141]

On appeal, the New Hampshire Supreme Court concluded that the state need not demonstrate a valid stop and arrest in order to secure a license revocation.[142] Further, the court ruled that the exclusionary rule has no application in civil cases.[143] The court offered no explanation why this must be so, except to note that the United States Supreme Court has specifically limited the exclusionary rule to criminal trials—under federal law, the exclusionary rule is not applicable in probation or parole proceedings, grand jury matters or civil tax cases.[144] The court, in short, saw "no reason to apply the [exclusionary rule] to [license revocation] hearings."[145]

Let's set aside the question whether the legality of the stop should play a role in license revocation proceedings, and focus instead on the New Hampshire Supreme Court's broader pronouncement in *Lopez*—that the application of the exclusionary rule under the state constitution will be limited to criminal cases. As an initial matter, the *Lopez* court erred in relying on federal precedent: the reason why the federal exclusionary rule is not applicable in probation or parole proceedings, or grand

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138 *Id.* at 449.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.* at 450. To support this conclusion the court relied, among other sources of authority, upon the Supreme Court of Pennsylvania's decision in *Dep't of Transp. v. Wysocki,* 535 A.2d 77 (Pa. 1987), in which that court concluded that the constitutionality of a police roadblock had no bearing on the later validity of a license suspension. *Id.*

143 *Lopez*, 761 A.2d at 450-51.

144 *Id.* at 451.

145 *Id.* (citing decisions of other state courts concluding that evidence inadmissible in a criminal proceeding still may be presented in a license revocation proceeding).

jury matters or civil tax cases, is because the United States Supreme Court has concluded that application of the rule in those situations would not serve to deter police misconduct,[146] the rationale for the federal rule.[147] And we know that the New Hampshire Supreme Court in *Canelo* discounted the deterrence rationale as a central basis for the exclusionary rule; deterrence could not, after that case, be considered as the animating rationale for the exclusionary rule under the state constitution.[148]

Whether the *Canelo* court adopted an expressive approach to the exclusionary rule is doubtful in light of *Lopez*. As discussed above,[149] the *Canelo* court arguably premised its understanding of the exclusionary rule on the view that, given the constitutional importance of an individual's information privacy, an unwarranted incursion into that privacy by the government had to be met with a condign response—namely, the suppression of the wrongfully seized evidence. The *Lopez* court undermined that reasoning by acknowledging the potential illegality of the search and then denying the expressive power of the government's illegal conduct—denying, that is, the disrespect the use of the wrongfully seized evidence shows the search victim in the license revocation proceeding. In so doing, the court implicitly rejected the expressive rationale, for the intensity of the expressive injury to the search victim does not depend upon whether the context is civil or criminal—the disrespect shown the search victim's privacy by the government would be the same regardless of the context.

As with *Edmunds*, it appears that the expressive rationale does not offer the best explanation for the court's understanding of the exclusionary rule.[150] Rather, it seems likely, based upon

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[146] *See, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 367 (1998) (concluding that "[t]he deterrence benefit of the exclusionary rule [in probation and parole hearings] would not outweigh the costs").

[147] *Id.* at 362 (stating that the exclusionary rule applies "only in contexts 'where its remedial objectives are thought most efficaciously served'" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))).

[148] *See* State v. Canelo, 653 A.2d 1097, 1105 (N.H. 1995) (stating that deterrence of police misconduct is not the exclusionary rule's "sole purpose").

[149] *See supra* notes 124-28 and accompanying text (discussing expressive rationale in the context of *Edmunds* and *Canelo*).

[150] Just for the record, neither the judicial integrity rationale, nor either version of the separation of powers rationale, would support the results in *Hughes* and *Lopez*. Both

the decisions in *Edmunds* and *Canelo*, that the high courts of Pennsylvania and New Hampshire were sure only that they disagreed with the United States Supreme Court's decision in *Leon*, in which the Court adopted the good faith exception to the federal exclusionary rule, and were not prepared to address the substance or the logical extent of non-deterrence based approaches to the exclusionary rule. Such state constitutional decision-making—reactive and essentially incompletely-theorized—leads, at a minimum, to the potential for inconsistency in future cases, as both *Hughes* and *Lopez* demonstrate. There are of course other consequences as well.

III. THE CONSEQUENCES OF INCOMPLETELY THEORIZED STATE CONSTITUTIONAL DECISION-MAKING

Negative consequences flow from reactive and incompletely theorized state constitutional decision-making. First, these decisions contribute little to constitutional discourse about the meaning of individual rights protections and how they ought to be applied. Second, these decisions fail to provide appropriate guidance to private and public actors about the reach of individual rights protections and the correlative authority of states to exercise the police power in ways that implicate those protections.

A. Contributing to Constitutional Discourse

In every case involving a protection common to both the federal and state constitutions a state court may contribute to the discourse about societal commitments to such values as equality, due process, free expression, and the freedom from

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Hughes and *Lopez* would run afoul of the judicial integrity rationale by realizing the judicial approval of "a manifest neglect . . . of the prohibitions of the Constitution." United States v. Weeks, 232 U.S. 383, 394 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). In addition, neither instance of government conduct could be considered in accord with the principle that the police, absent exigent circumstances, seek antecedent justification for a search. *See* Lynch, *supra* note 81, at 738. Finally, neither case applied the separation of powers principle that the judiciary, when faced with "governmental actors . . . doing something repugnant to the constitution," must invalidate that conduct, regardless of the purported "costs" associated with such invalidation. Schrock & Welsh, *supra* note 82, at 347.

unreasonable searches and seizures.[151] Judges, advocates, and commentators participate, via judicial opinions, legal briefs, and scholarly articles, in this discourse by advancing various arguments about the meaning of a constitutional provision or about the application of constitutional doctrine.[152] What we call constitutional law is derived from this discourse, from the arguments that persuade and convince; indeed, "constitutional discourse," as James Gardner has observed, "is generally the only means by which positive constitutional law is made, other than by adopting or amending a constitution."[153]

As a general matter, the United States Supreme Court feeds our constitutional discourse—the Court's decisions are its primary subject, or at least the point from which debates about constitutional meaning and the application of doctrine proceeds. This is to be expected when the Court has the final word in respect to the interpretation and application of the provisions of the United States Constitution.[154] But though its determinations are definitive as to federal law, the Court has no monopoly on interpretive judgments about the meaning of constitutional text: a determination by the Supreme Court does not necessarily represent a superior interpretation or application of a constitutional command.[155] As Justice Robert Jackson famously put it, the "[Court is] not final because [it is] infallible, but . . . infallible only because [it is] final."[156]

Like their federal court brethren, state court judges hear constitutional challenges to government action that allegedly

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[151] *See* Friedman & Baron, *supra* note 5, at 128 (discussing the importance of state court contributions to constitutional discourse).

[152] *See* ANTHONY G. AMSTERDAM AND JEROME BRUNER, MINDING THE LAW 173 (2000) (describing legal discourse in the litigation context as a contest of arguments about interpretation). Justice Felix Frankfurter observed, in a different context: "without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." Dick v. New York Life Ins. Co., 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting).

[153] Gardner, *supra* note 5, at 769.

[154] *See* City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (stating that the Court has "primary authority" to interpret the Federal Constitution).

[155] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 176 (1998) (suggesting that when federal and state constitutional interpretations diverge, "it may be that one of the interpreters has interpreted the pertinent constitutional provision wrongly").

[156] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

infringes individual rights and liberties, and they do so in the context of cases and controversies—in the context, that is, of actual disputes about the validity of government action, as framed by factual records developed at the trial level and by the arguments of advocates on either side of the issue. These are the familiar attributes of appellate decision-making in American courts, common to both the federal and state systems.[157]

Similarities in perspective, however, are not merely a product of the contours of appellate practice and procedure. In resolving an individual rights challenge to government action, the justices of the state high courts, no less than their federal counterparts, must appreciate the outer limits of a judicial role defined in large part by institutional arrangements that favor regulation through the processes of representative—and, in many states, direct—democracy.[158] Though judicial selection processes may differ between the federal and state systems and from state to state, the judges who sit on state courts, too, must reckon with the counter-majoritarian difficulty and temper the exercise of their discretion with a concern to avoid judicial overreaching when the matter before the court implicates the validity of majoritarian preferences.[159]

In view of this shared perspective, state courts may contribute to constitutional discourse on individual rights in at least two ways. First, state constitutional decisions may provide a first look at the interpretive possibilities that lie in a constitu-

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[157] This is so even in states in which the courts may render advisory opinions when requested by the legislature or the executive; though in such instances a court's determination will have no immediate effect upon one or more citizens, still the courts invite arguments from all parties interested in the constitutional inquiry submitted. *See, e.g.*, Opinion of the Justices to the Senate, 484 N.E.2d 95, 98 (Mass. 1985) (defining focus of advisory opinion by reference to issues raised in briefs submitted).

[158] The institutional arrangements of state governments may differ from the federal constitutional structure in regard to features like direct democracy and the line item veto by the executive, but state constitutions generally do not deviate from the core aspects of the three-branch model established in the original state constitutions. *See* Rogan Kersh et al., *"More a Distinction of Words Than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 14 (1998) (discussing three-branch model in the original state constitutions).

[159] *See, e.g.*, Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004) (discussing the role of state supreme courts vis-à-vis constitutional authority).

tional provision, or in an area of constitutional law where the application of traditional doctrinal principles remains unsettled. Consider the question of the constitutionality of prohibitions on same-sex marriage: in *Baker v. State*,[160] *Goodridge v. Department of Public Health*,[161] and *Lewis v. Harris*,[162] the state supreme courts of Vermont, Massachusetts, and New Jersey, respectively, concluded that such prohibitions lacked a rational basis under state equal protection principles. In these cases, the state courts took seriously the task of defining the parameters of equal protection doctrine in the context of laws that implicated important personal interests,[163] and these cases will serve as touchstones for state and federal courts addressing similar issues.

Such judicial reliance is not hypothetical. The *Goodridge* court expressly considered *Baker* and the reasoning of the Vermont Supreme Court in interpreting and applying the Massachusetts Constitution,[164] and the *Lewis* court similarly considered *Goodridge*.[165] Even the United States Supreme Court—certain members of which have criticized reliance upon comparative judicial experiences for guidance[166]—has turned to the experience of state courts when addressing the scope of federal constitutional commitments to individual rights like due process and equal protection.[167] In *Nollan v. California Coastal Commission*,[168] for example, the Court relied upon a state constitu-

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160 744 A.2d 864 (Vt. 1999).

161 798 N.E.2d 941 (Mass. 2003).

162 908 A.2d 196 (N.J. 2006).

163 *See* Lawrence Friedman, *Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 280-82 (discussing *Baker* and *Goodridge*).

164 *See Goodridge*, 798 N.E.2d at 957 (discussing Vermont Supreme Court's decision in *Baker*).

165 *See Lewis*, 908 A.2d at 219-20 (discussing Massachusetts Supreme Judicial Court's decision in *Goodridge*).

166 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (criticizing the Court's discussion of "foreign views" in determining the constitutionality of prohibitions on homosexual sodomy as "[d]angerous dicta").

167 *See* 1 DAVID O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENT ACCOUNTABILITY 97 (6th ed. 2005) (reviewing the way in which the United States Supreme Court has taken judicial notice of "comparative laws and experiences").

168 483 U.S. 825 (1987).

tional takings analysis to establish the limits of permissible land use regulation under the United States Constitution.[169]

The second way in which state courts may contribute to constitutional discourse on common individual rights protections is through the productive use of opportunities to consider anew those constitutional provisions or doctrines whose meaning in federal law may be viewed as reasonably settled. These are the cases that supply a forum for additional inquiry into the balance between individual rights and democratic-majoritarian concerns, and whether the United States Supreme Court has got the balance right.[170] To the extent a state court commits to articulating the rationale that supports its substantive disagreement with the result in a federal constitutional case concerning a parallel individual rights protection, the state decision will yield insights into how best to interpret and apply the constitutional provision in question—how best, that is, to reconcile an individual right with contrary majoritarian desires.[171]

When a state court provides a reasoned explanation for the basis of its disagreement with the United States Supreme Court in respect to the scope of an individual constitutional right, the court effectively registers what James Gardner has called a "public dissent" from a decision of the United States Supreme Court.[172] Dissent, as Cass Sunstein has explained, is particularly important in judicial decision-making because adherence to the doctrine of stare decisis may result in a court's failure to consider that a prior judgment may have been an aberration,

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[169] *See id.* at 837 (citing *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12 (N.H. 1981)).

[170] *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147-48 (1993) (suggesting that "constitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order"); *cf.* Stephen E. Henderson, *Learning From All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 374 (2006) (expressing "hope that analysis of state constitutional law will influence the United States Supreme Court").

[171] The same reasoning applies when a state court decision is in agreement with a federal decision on the same issue—a valuable contribution to constitutional discourse may be made in instances in which a state court confirms that the United States Supreme Court's understanding of an individual rights provision is the best available.

[172] Gardner, *supra* note 12, at 1033.

rather than the product of reason and logic.[173] A substantive dissenting opinion may serve to deter future reliance on the arguably erroneous decision-making of previous courts,[174] and dissenting views accordingly may serve to prevent future, erroneous constitutional interpretations and applications.[175] For purposes of constitutional discourse, state court opinions on individual rights matters may, as Gardner has concluded, "influence[] long-term public understandings of the appropriate content of constitutionally guaranteed rights."[176]

It is in this respect that *Edmunds* and *Canelo* disappoint. The problem is not the state courts' disagreement with the United States Supreme Court per se; rather, it is the failure of each court to articulate a coherent rationale for its understanding of the exclusionary rule and why that understanding leads logically to rejection of the good faith exception. In *United States v. Leon*,[177] the Supreme Court made patent its rationale for the exclusionary rule, focusing on deterrence as a guide to the rule's application: *Leon* teaches that a cost-benefit assessment of the possible deterrent effect of suppressing evidence, rather than a balancing of constitutional interests, should be utilized to determine whether the exclusionary rule applies in particular circumstances.[178]

In neither *Edmunds* nor *Canelo*, by contrast, did the court provide such specific normative grounding in support of its understanding of the exclusionary rule. Though both courts explicitly rejected the deterrence rationale and adverted to the constitutional importance of individual privacy interests, neither ven-

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[173] *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 59 (2003). This is so regardless of whether a court in a particular case adheres to a narrow form of stare decisis, pursuant to which the court regards itself as obligated to follow the decisions of certain courts, or the court adheres to a more relaxed stare decisis, which looks to bring guidance from the decisions of other courts. *See* RONALD DWORKIN, LAW'S EMPIRE 25 (1986) (comparing "strict" and "relaxed" forms of stare decisis).

[174] *See* SUNSTEIN, *supra* note 173, at 176-77. Sunstein points to studies demonstrating that a diversity of viewpoints among judges tends to prevent errors in much the same way it does in other situations in which further information leads to principled decision-making. *See id.*

[175] *See* SUNSTEIN, *supra* note 13, at 27.

[176] Gardner, *supra* note 12, at 1033.

[177] 468 U.S. 897 (1984).

[178] *Id.* at 922.

tured an alternative explanation for the operation of the exclusionary rule under state law. As discussed above, the opinions in *Edmunds* and *Canelo* can tolerably be read as following the expressive approach to the exclusionary rule, pursuant to which there can be no exception for unauthorized searches undertaken by police officers in good faith.[179] But even accepting that the expressive rationale underlies those decisions, subsequent cases suggest that rationale will not inform the application of the exclusionary rule in Pennsylvania and New Hampshire outside the context of searches purportedly undertaken in good faith. Indeed, in *Lopez*, the New Hampshire court appeared willing to embrace the pragmatic approach it dismissed in *Canelo* when it concluded the exclusionary rule does not apply in civil cases.[180]

Absent the articulation of a coherent theory to explain how the exclusionary rule should be understood and applied, the decisions in *Edmunds* and *Canelo* cannot function effectively as public dissents to *Leon*; they represent nothing more than mere expressions of disagreement with the result in *Leon*. Commentators have criticized *Leon* and the deterrence rationale,[181] but alternative theories that address the application of the exclusionary rule, produced by state judges acting under institutional limits similar to those that constrain the Justices of the United States Supreme Court, are more likely to be persuasive in future cases involving the rule's scope. For it is in state court decisions that endeavor to explain such alternative theories that lawyers and judges are likely to discover the bases upon which they may explore and exploit skepticism about the work of previous courts—including the United States Supreme Court—and develop the arguments that may well prevent the perpetuation of undistinguished lines of constitutional argument.

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[179] *See supra* notes 124-29 and accompanying text (arguing that the expressive rational best explains the reasoning and result in *Edmunds* and *Canelo*).

[180] *See* Lopez v. Dir., N.H. Div. of Motor Vehicles, 761 A.2d 448, 450 (N.H. 2000).

[181] *See, e.g.*, Bloom, *supra* note 29, at 467-71 (criticizing the abandonment of judicial integrity as the rationale underlying the exclusionary rule); Kamisar, *supra* note 29, at 163 (criticizing the cost-benefit exclusionary rule analysis embraced in *Leon*).

B. Providing Guidance in a State System

The cases are legion in which we wish a court had, all things considered, said a bit more about a particular result, or provided more detailed reasons for the adoption of a particular doctrinal rule.[182] Losing parties, obviously, would prefer a reasoned explanation for why their arguments failed to persuade.[183] But the negative consequences of reactive, under-theorized state constitutional decisions extend beyond the mystery of a loss in an appellate court.

Reactive and incompletely theorized state constitutional decisions deny at least two groups appropriate guidance: those individuals who are trying to plan their affairs, and those who must, in the course of their official duties, determine the law's reach.[184] The first group includes the private citizens who seek to rely upon a judicial decision to clarify the breadth of the legal regulation of a constitutional protection—anyone, that is, who, in order to make informed choices in life, would be helped by knowing the law's bounds and how those bounds might affect a given choice. Individuals contemplating the purchase of residential real estate, for example, would benefit by knowing whether the property in which they are interested may be taken by the state or local government, consistent with the Fifth Amend-

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[182] *See* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2007 (2005) (opining, in respect to minimal decision-making by the United States Supreme Court, that there "exists the danger that the Court will say too little").

[183] *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 307 (1990) (stressing the importance of parties' understanding of rulings against them).

[184] SUNSTEIN, *supra* note 13, at 48 (explaining that costs associated with shallow decision-making are "faced by those who are trying to plan their affairs and who must try to figure out what the law will ultimately be"). *See also* Michel Rosenfeld, *Autopoiesis and Justice*, 13 CARDOZO L. REV. 1681, 1701 (1992) ("The greater the certainty that a social actor has concerning the expectations of all concerned, the more insurance that actor has concerning the consequences of his or her dealings with others."); Frederick Schauer, *Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 48-49 (2006) (arguing that "the domain of rights is . . . highly consequential both to the rights holders and to the policies that rights constrain").

ment[185] and its state constitutional equivalents,[186] to promote economic development.[187]

The second group includes public officials who have some obligation to determine the law's limits as best they are able. When addressing issues related to proposed changes in a regulatory scheme or to the enforcement of existing regulations, state and local legislative representatives and executive officers must take account of any constitutional ruling that affects the limits of permissible government action.[188] As well, lower court judges must attempt to chart the reach of a state constitutional decision that alters the balance between state authority and a particular individual rights protection.[189] Incompletely theorized constitutional decisions tend to exacerbate problems of interpretation and application in areas of the law, like criminal procedure, where there exists a great deal of complex and often conflicting precedent in respect to issues commonly raised in state courts.

Consider again the Pennsylvania and New Hampshire exclusionary rule cases. The lack of clarity as to the underlying rationale for the exclusionary rule and the rejection of the good faith exception in *Edmunds* led, at a minimum, to questions in the lower courts and arguments by lawyers about the effect of that rejection in instances involving police determinations of apparent authority.[190] And, in light of the *Canelo* court's unadorned reliance upon notions of privacy in rejecting the good faith exception to the exclusionary rule, the trial court in *Lopez*

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[185] The Fifth Amendment provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[186] *See, e.g.*, CONN. CONST. art. I, § 11 ("The property of no person shall be taken from public use, without just compensation therefor.").

[187] *See* Kelo v. City of New London, 545 U.S. 469 (2005) (sanctioning municipal exercise of eminent domain power for public purpose of economic development).

[188] *See* Siegel, *supra* note 182, at 2006.

[189] *See* Jeffrey R. Rosen, *The Age of Mixed Results*, NEW REPUBLIC, June 28, 1999, at 43 ("When the Supreme Court issues terse opinions whose reasoning is hard to discern, it compounds the confusion of inferior courts in precisely those cases where the relevant actors are pleading for a clear resolution.").

[190] *See* Commonwealth v. Hughes, 836 A.2d 893, 902-03, 903 n.8 (Pa. 2003) (discussing interaction between the exclusionary rule and apparent authority exception and lower court treatment of same).

understandably concluded that nothing ought to preclude the application of the exclusionary rule in civil proceedings under the state constitution.[191]

Had they read the decisions in *Edmunds* and *Canelo*, Mr. Hughes and Mr. Lopez (and their attorneys) could be forgiven for believing they possessed a constitutionally-protected interest in government compliance with the preconditions to a valid search and seizure, an interest that would be honored regardless whether a companion had apparent authority to waive such compliance, or whether that interest was implicated in circumstances that did not involve the possibility of criminal punishment. Indeed, state and local legislators and enforcement officers plausibly might have believed likewise. But that interest, to the extent it ever existed, proved ephemeral, lost in the space between the privacy that the Pennsylvania and New Hampshire Supreme Courts assured us their constitutional exclusionary rules protected, and those courts' incomplete explanations of how that could be.

IV. OVERCOMING THE JURISPRUDENTIAL CONCERNS THAT LEAD TO INCOMPLETELY THEORIZED DECISION-MAKING

Institutional factors may account for an incompletely theorized state constitutional decision: state supreme courts generally have larger dockets and fewer law clerks than the United States Supreme Court, and state court justices who are directly accountable to the electorate may have a greater hesitance to commit to fully theorized constitutional decisions.[192] Apart from

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[191] *See* Lopez v. Dir., N.H. Div. of Motor Vehicles, 761 A.2d 448, 450 (N.H. 2000) (discussing trial court conclusion as to applicability of the exclusionary rule).

[192] *See, e.g.*, F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 206 (1999) ("Knowledge of how court decisions will affect powerful groups narrows the range of likely rulings by the [elected judge]."). Also, it simply may not occur to the court in a given case to undertake a deeper explanation of the theory underlying their interpretation of a specific individual rights provision or application of doctrinal rules—perhaps precedent cases, federal and state, did not suggest a theoretical thread to be explored; or perhaps counsel did not propose rationales for either amplifying or distinguishing the facial understanding of those precedent cases. *See, e.g.*, Jenkins v. Chief Justice of the Dist. Court Dep't, 619 N.E.2d 324, 334-35 (Mass. 1993) (rejecting, following a survey of state authorities, the United States Supreme Court's rule that forty-eight hours provides reasonable time in which to complete arrest procedures).

those institutional limitations, it may be that an incompletely theorized decision is the result of a jurisprudential choice. Commentators have identified several jurisprudential concerns that plausibly explain why, in a given case, the United States Supreme Court might prefer an incompletely theorized rationale for its decision; the question upon which I focus here is whether these concerns apply equally to state courts deciding similar issues under their states' constitutions—and whether, even if those concerns are legitimate in the state constitutional context, they are outweighed by the value of state court contributions to constitutional discourse and the practical importance of providing guidance about the limits of a state's authority in respect to the scope of individual rights protections.

A. The Jurisprudential Concerns

The United States Supreme Court's hesitance to expound either a theoretical exploration of constitutional meaning or a rationale for a doctrinal rule or standard established to govern the application of a constitutional command may reflect one or more of several jurisprudential concerns. First, the Court's hesitance may reflect a strategic concern: an incompletely theorized decision acknowledges the anxieties associated with decision-making on a national scale—with the Court's exposition of doctrines and standards that will have equal force in politically, culturally, and geographically distinct regions of the country.[193] Second, it may reflect a concern to avoid internal conflict: an incompletely theorized decision acknowledges that the Justices must often compromise when they disagree about the basis for particular outcomes or about the meaning of the more abstract commitments to individual rights protections.[194] Finally, it may reflect a concern to avoid unnecessarily broad lawmaking: an

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[193] *See* Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 974-75 (1985); 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, 396-97 (1984).

[194] *See* SUNSTEIN, *supra* note 13, at 11-13.

incompletely theorized decision acknowledges a desire to expand legal doctrines incrementally.[195]

The strategic concern is not at work in the state courts. As Lawrence Sager has noted, the United States Supreme Court "has concerns of judicial management that are more extreme than comparable problems within state judiciaries; and these management concerns interact unhappily with the diversity of settings in which the rules established by the Court must operate."[196] At a minimum, state supreme courts do not face the strategic need to create rules that function equally well in the union's fifty states. To illustrate, Sager points to the United States Supreme Court's conclusion, in *San Antonio Independent School District v. Rodriquez*,[197] that it would not be advisable to attempt to articulate an equal protection rule applicable to public school financing challenges throughout the nation.[198] State court judges do not confront that problem when addressing similar challenges under state constitutions.[199]

At the same time, a concern to manage internal disagreement about textual meaning or underlying rationales for doctrinal choices would seem to be one state high courts face in much the same way as the United States Supreme Court. Incompletely theorized decision-making in the Supreme Court, as Sunstein has argued, may reflect both harmony among members of the Court on concrete particulars and disagreement

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195 *See id.*

196 Sager, *supra* note 193, at 974.

197 411 U.S. 1 (1973).

198 *See, e.g.*, *id.* at 55 (stating that the Court should not assume "a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested").

199 *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (challenge to financing of public education under Connecticut Constitution); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) (challenge to financing of public education under New Hampshire Constitution); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) (challenge to financing of public education under New Jersey Constitution); Brigham v. State, 692 A.2d 384 (Vt. 1997) (challenge to financing of public education under Vermont Constitution); *see also* Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281 (1998) (discussing cases and offering critical assessment).

about the underlying basis for those particulars.[200] In such an environment, judicial decisions will be constructed around the basic principles upon which a majority can agree.[201] This phenomenon is not unique to the Supreme Court: even in courts with fewer members there will be disagreements about the implications and consequences of abstract rationales.[202] Reflecting upon his time as an associate justice of the Massachusetts Supreme Judicial Court, Francis O'Connor observed: "Each of the justices was brought up in a different kitchen, so to speak, with the result that the justices do not think alike about a lot of issues."[203]

Similarly, a concern to avoid unnecessary rulemaking will likely find purchase in state courts. These courts are common law courts, after all, and disposed in practice to treat constitutional law as a species of common law—like the United States Supreme Court, state courts are often interpreting cases about constitutional text, and not the text itself, in an effort to derive and apply governing standards and rules.[204] This approach results in decisions that tend to eschew fully articulated explanations for doctrinal choices; a relatively small expansion of the protection against unreasonable searches and seizures, for example, may be accomplished without engaging in a deep analysis of the underlying rationale simply by comparing analogous—or differing—factual circumstances.[205]

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[200] *See* SUNSTEIN, *supra* note 13, at 11. Sunstein's view of incompletely theorized decision-making in the United States Supreme Court, as an aspect of what he calls judicial "minimalism," has not gone unchallenged. *Cf.*, Siegel, *supra* note 182, at *passim* (arguing that Sunstein's account of United States Supreme Court decision-making is neither descriptively nor normatively accurate).

[201] *See* SUNSTEIN, *supra* note 13, at 14 (arguing that incompletely theorized decision-making seeks to avoid potentially controversial "foundational issues if and to the extent" possible).

[202] *See, e.g.*, State v. Canelo, 653 A.2d 1097, 1111-12 (N.H. 1995) (Thayer, J., dissenting) (criticizing majority's understanding of the rationale for state exclusionary rule).

[203] Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping With Dissent*, 83 MASS. L. REV. 93, 94 (1998).

[204] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (discussing and advocating common law approach to constitutional decision-making).

[205] *See, e.g.*, Commonwealth v. McCarthy, 705 N.E.2d 1110 (Mass. 1999) (protection against unreasonable searches and seizures under state constitution turns on whether parking space is within apartment's curtilage). *See also* EDWARD F. HENNESSEY, JUDGES

B. Responding to the Jurisprudential Concerns

Though the first jurisprudential concern—the consequences of lawmaking on a national scale—need not detain a state court, state supreme court justices legitimately may be inclined to avoid both internal conflict and unnecessarily broad decision-making by refraining from articulating completely theorized justifications for constitutional rulings.[206] Notwithstanding the force of these concerns, however, the question remains whether the desire to avoid these issues by crafting an incompletely theorized decision is outweighed by both the latent expectation in our federalist system that the court will contribute to constitutional discourse on individual rights issues and the practical need for constitutional guidance within a state legal system.

The normative expectation that state courts will contribute to constitutional discourse derives from the structural design of the republic and its dual political capacities, federal and state.[207] Among other ends, the Framers desired this governmental arrangement to enhance and protect individual liberties through the availability of multiple governmental authorities to check and balance one another.[208] State courts can fulfill this checking and balancing function for the citizens of their state by interpreting their state constitutions independently of federal precedent in cases involving common individual rights protec-

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MAKING LAW 9-10 (1994) (discussing the importance and difficulty from judicial perspective of identifying controlling principles in a line of cases).

[206] Apart from these jurisprudential concerns, there is the possibility that simple justice is all the circumstances of a case require—a decision righting an obvious wrong, or affirming the trial court's inclination to do the same. In these rare instances, the state court need not write an elaborate opinion explaining its decision to affirm or reverse the lower court's judgment. *See* SUNSTEIN, *supra* note 13, at 15 (discussing circumstances in which reason for decision is not necessary).

[207] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (discussing the Framers' decision to "split the atom of sovereignty").

[208] *See* THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (arguing that system of dual sovereignty provides "double security" to the people); *see also* Daniel J. Elazar, *Opening the Third Century of American Federalism: Issues and Prospects*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 14 (1990) (arguing that federalism provides "useful redundancy and fail-safe mechanisms, so that when one part of the political system cannot function, other parts can take over"); Kathleen M. Sullivan, *The Balance of Power Between the Federal Government and the States*, *in* NEW FEDERALIST PAPERS 111, 112-13 (Alan Brinkley, et al. eds., 1997) (discussing the constitutional division of power as protecting liberty and the public good).

tions, relying upon such precedent for guidance as they would any persuasive case from another jurisdiction. When independent state constitutional interpretation expands the compass of an individual right, the rejection of federal precedent serves to cabin the authority of state (and local) government in circumstances in which federal law would not: this is the second political capacity, in the form of a state court implementing the state constitution, at work.

But only when a state constitutional decision explains the basis for disagreement with the United States Supreme Court does the state court effectively exert its influence consonant with the role of the states in our federal system. In other words, only when a decision presents a fully theorized alternative does it offer more than the possibility of a redundant protection for the citizens of a state in the circumstances of that case; in the completely theorized decision lies the basis for challenging the way in which individual rights protections are implemented under other states' constitutions.[209] Differing assessments of the nature of individual rights commitments by state courts provide us, in the spirit of Robert Cover's "polycentric norm articulation," with examples of how the relationship between government and citizen may be configured, and those arrangements may in the future—in judicial and legislative chambers alike—be profitably compared and contrasted with the federal model.[210]

In addition to the expectation that state courts will fulfill the expectations of our federalist system, there is the practical need for guidance at the state level. Incompletely theorized decision-making leads to uncertainty about individual rights protections under the state constitution, which leads to uncertainty about the extent to which government can act in many areas.[211]

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[209] *See* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133-35 (2006) (discussing the frequency with which state courts refer to the judgments of other states in constitutional and other matters); *cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states in our federal system may serve as laboratories of democracy).

[210] *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 673-74 (1981) (discussing the "distinct advantages" in our federal system of "polycentric norm articulation").

[211] *See supra* notes 182-89 and accompanying text (discussing need for guidance as to the limits of governmental authority).

To be sure, absolute certainty about the meaning of a constitutional protection or application of constitutional doctrine is not possible.[212] Once a state court has determined that it disagrees with the United States Supreme Court, however, a well-theorized explanation for that determination will provide citizens and lawmakers with more guidance as to the bounds of state constitutional limitations on government power, and those citizens and lawmakers may then act with greater confidence as to the law's reach. As state court dockets continue to grow in relation to federal court dockets,[213] particularly in respect to criminal cases,[214] even another degree of certainty may be instructive.[215] Given that each new criminal case represents an opportunity to dispute the limits of government authority, such guidance could serve to deter frivolous individual rights claims—if not in state and federal courts, then in the halls of legislators and executive officers.[216]

Judicial interest in internal harmony or incremental doctrinal growth may lead a state court to prefer not to supply a

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[212] I do not mean to suggest that completely theorized constitutional decisions could eliminate all future uncertainty; as Jerome Frank wisely noted, "no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made." JEROME FRANK, LAW AND THE MODERN MIND 6 (1949); *see also* TARR, *supra* note 155, at 181 n.32 (observing that, "given the Supreme Court's well-documented difficulties in such fields as religious liberty and search-and-seizure," there will always be an element of unpredictability in the application of individual rights doctrines).

[213] *See* RICHARD SCHAUFFLER ET AL., EXAMINING THE WORK OF STATE COURTS, 2004: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13-15 (National Center for State Courts 2005) (reporting increase in state court cases).

[214] *See* Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agar, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL L. STUDIES 755, 757 (2004) (reporting that "state courts of general jurisdiction resolve nearly 28 times as many civil cases and 82 times as many criminal cases as do federal district courts").

[215] *Cf.* Cass R. Sunstein, *Problems With Minimalism*, 58 STAN. L. REV. 1899, 1914 (2006) (advocating more completely theorized decision-making "[w]hen the area requires a high degree of predictability, and when the Court has had a great deal of experience with the area").

[216] *See* Giuseppe Dari-Mattiacci & Bruno Deffains, *Uncertainty of Law and the Legal Process* 24 (George Mason University Law & Economics Research Paper Series, Working Paper No. 05-39, Dec. 7, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869368 (concluding that "the rate of litigation and the degree of uncertainty of a legal system are inherently related and one cannot control the former without affecting the latter and vice versa"); Hanssen, *supra* note 191, at 209 (concluding that "an increase in the uncertainty surrounding judicial decisions may be expected to raise the amount of litigation").

completely theorized explanation for the rejection of federal precedent in an individual rights case. But the resulting decision will scarcely fulfill the normative expectation of state courts inherent in the federal constitutional structure. And the price for that jurisprudential choice will be increased uncertainty about constraints on state governments in respect to individual rights protections—a price that will be paid within and without the judicial system in more litigation and in potentially wasteful regulatory efforts.[217]

V. TOWARD MORE COMPLETELY THEORIZED STATE CONSTITUTIONAL DECISION-MAKING

The burden of persuading state court justices to consider the benefits of more completely theorized individual rights decisions falls inevitably upon the lawyers who appear before them.[218] If a state court views as relevant to its work the jurisprudential concerns that lead to incompletely theorized decision-making, lawyers must take the hard road and seek to educate the justices about the benefits of developing completely theorized constitutional arguments. They must demonstrate that, to the extent the jurisprudential concerns that lead to incompletely theorized decisions are at play, those concerns should be balanced against the importance of contributing to discourse on the constitutional provision or doctrine at issue; and they must demonstrate to the court the practical importance of even a modestly more precise understanding of state law.[219]

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[217] *See* Dari-Mattiacci & Deffains, *supra* note 216, at 21 ("Uncertainty triggers . . . allocative costs, as the lack of certainty concerning legal entitlements distorts the process of resource allocation."); *see also id*. at 25 (concluding that the cost of judicial lawmaking "is partially borne by taxpayers and partially spread among litigants in the form of lawyers' fees and time spent dealing with the judicial system").

[218] Law professors, it seems, have increasingly little direct influence in these matters. *See* Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, March 19, 2007, at A8.

[219] *See, e.g.*, Louis Kaplow & Steven Shavell, *Legal Advice About Acts Already Committed*, 10 INT'L REV. L. & ECON. 149, 158 (1990) (concluding that, "if individuals know what legal rules will apply and the rules are properly enforced, their behavior will be affected by these rules"); *see also id.* at 159 (concluding that, when individuals have more information about legal rules and exceptions, "their choice of acts will be affected"); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litiga-*

As an initial matter, counsel need to develop the theoretical rationales that support more completely theorized individual rights decision-making. Persuading the lawyers in state constitutional cases to undertake this level of advocacy is not necessarily an impossible task. In matters involving individual rights, and particularly in the criminal context, the litigants are represented by counsel who are particularly attuned to the need for greater certainty and predictability in the law. These lawyers represent the judicial system's "repeat players," and they are most likely to have an interest in parsing precedent cases, state and federal, as well as relevant scholarly commentary, to discern or propose rationales that explain how doctrinal standards ought to be articulated and applied.[220]

Especially at the appellate level, these lawyers have an incentive to favor more refined development of theoretical rationales for individual rights doctrines. Defense counsel in cases implicating the exclusionary rule, for example, would likely prefer fewer and narrower exceptions to the rule. A call to the general interest in privacy may be tactically sufficient in one case to dissuade a state court from either adopting or applying an exception to the exclusionary rule—see *Edmunds* and *Canelo*. But legal doctrines in common law systems develop on a continuum, and a deeper theory of the privacy that the exclusionary rule serves to protect—based, perhaps, upon institutional compliance, judicial integrity, separation of powers, or expressive meaning—would provide a surer base from which to proceed in the next case.

State supreme courts have expressly acknowledged that it is the lawyers appearing before them who must lead the way. Indeed, some courts have issued instructions to lawyers urging them to develop fully theorized arguments when raising state constitutional claims in individual rights cases. In *State v. Jew-*

tion: Its Effects and Social Desirability, 102 HARV. L. REV. 565, 580-81 (1989) (discussing the value of legal advice in the litigation context).

[220] *See* Ronald F. Wright, *When Do We Want Incomplete Agreements? A Comment on Sunstein's Holmes Devise Lecture*, 31 WAKE FOREST L. REV. 459, 465 (1996) (suggesting that governmental parties value clear guidance "because the institutions of government are more likely to be 'repeat players'").

ett,[221] the Supreme Court of Vermont lamented the parties' failure to present "any substantive analysis or argument" on the state constitutional claim, that the police had illegally stopped and arrested the defendant.[222] The court directed the parties to file supplemental briefs addressing the matter,[223] and proceeded to offer practitioners a primer in the various modes of constitutional argument, from historical and textual arguments to arguments based upon precedent and policy considerations.[224] The court emphasized the importance of developing arguments about the meaning and application of constitutional provisions which recognize that, as in federal constitutional law, text and external sources will often prove to be merely an analytical starting point for the conscientious judge.[225]

The Vermont court assumed that developing well grounded constitutional arguments is not beyond the competence of most attorneys. As Kris Franklin has observed, while theorizing involves "imagination, construction, [and] creativity,"[226] law school is "awash in theoretical constructs, however unspoken."[227] The kind of theoretical argument that state constitutional litigation requires is no different from that which law schools train students to appreciate and undertake as a matter of course, even if indirectly. It calls for a lawyer to bridge the gap between text and precedent by discerning the values—like democracy-reinforcement or efficiency—inherent in constitutional structures or history, and to imagine the effect on those values of various doctrinal moves in proposing an explanation for a holding that will continue to promote the substance of those values, and that will have relevance in factual circumstances as yet unknown.[228]

This kind of theorizing is within the grasp of professionals who have been trained to read texts and the cases interpreting

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[221] 500 A.2d 233 (Vt. 1985).

[222] *Id.* at 234.

[223] *Id.*

[224] *Id.* at 236-37.

[225] "One longs to hear once again of legal concepts," the court observed, "their meaning and origin." *Id.* at 235.

[226] Kris Franklin, *"Theory Saved My Life,"* 8 N.Y. CITY L. REV. 599, 600 (2005).

[227] *Id.* at 608.

[228] *See id.* at 610-11.

those texts closely, and to discern in those materials the discrete differences upon which convincing arguments are made. Some lawyers may be better at this work than others, but at bottom this is the object of the first year curriculum at most American law schools.

CONCLUSION

When a state supreme court considers an individual rights claim upon which the United States Supreme Court has passed, we have a sense that the court should explicate the basis for a difference of opinion over the meaning or application of a constitutional provision that is textually similar—that the state court should provide a deeper justification for a constitutional ruling than simple disagreement with a majority of the United States Supreme Court. There is nothing wrong with such disagreement, of course; the Supreme Court is not infallible. But, notwithstanding the immediate benefit to the winning party, state constitutional decisions that lack meaningful rationales for the court's interpretive and doctrinal choices are hollow: such decisions fail to contribute meaningfully to constitutional discourse and may well impede the efficient administration of justice.

The basis for more meaningful state court decision-making in individual rights cases lies in the constitutional arguments of lawyers: the advocates appearing before state high courts must advance arguments well grounded in theory, to the end of persuading state court justices, first, that they can and should participate in the larger discourse about the nature and effect of our foundational commitments to individual rights; and, second, that they can and should seek to provide citizens with sufficient guidance as to what the state constitution requires. Only when state courts are convinced of the value of this effort are we likely to see state constitutional decisions that contribute to a greater understanding of how the relationship between government and citizen may be configured, and that more explicitly address the limits of governmental authority where individual rights and liberties are concerned.