▶ CRIMINAL LAW

The Loneliness of the Kansas Constitution*

by Daniel E. Monnat & Paige A. Nichols

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Breathing new life into Kansas constitutional law may be challenging, but it is the responsibility of the Kansas bar and the Kansas courts in a federal system.

—Steve McAllister, *Comment, Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 Kan. L. Rev. 593, 622 (1987).

Introduction

The year was 1859. The days of Bleeding Kansas had finally come to an end, and Kansas' founding fathers were crowded into a Union Pacific Railway office in Wyandotte, Kansas Territory, debating the terms of the free-state constitution. At issue was whether the "equal and inalienable" rights guaranteed in section one of the Kansas Bill of Rights[1] should be extended to "*all* men" or just to *free* (i.e., unenslaved) men.

One dissenter complained that if the section did not explicitly exclude persons "owing service" in other states, the guarantee would be seen as a "hostile blow" toward the fugitive-slave law and the *Dred Scott* decision upholding that law under the federal constitution.[2]

Country doctor James Blunt passionately defended the guarantee as to *all* men, observing that "those who made the [fugitive slave] law and those [federal justices] who decide upon its constitutionality are but human, and liable to err."[3] The doctor urged his fellow state founders to let "[t]he eyes of the whole country…see Kansas at this time place herself proudly and firmly upon the ancient doctrine of State rights, or State sovereignty."[4] The doctor's position prevailed.[5]

This is but one example of the Kansas framers' intent to create a forward-looking state constitution—a collection of rights that would have independent force apart from the federal constitution as interpreted by the United States Supreme Court. These framers' "proud and firm" insistence on state sovereignty is also evident in their adoption of constitutional provisions prohibiting slavery, exempting homesteads from forced sales, and advancing the property and parenting rights of women.[6] As one early Kansas lawyer observed, "[m]ost of the progressive ideas of the decade were incorporated" in the Kansas constitution.[7]

Today the original handwritten, eight-page document lies safely in the archives of the Kansas State Historical Society. A single rotating page is displayed under glass in the Kansas Museum of History. And what has become of this document in the Kansas courts? With few exceptions, it appears to have been relegated to the archives there, as well.

Over the past half-century, Kansas' state constitution has come to play second fiddle to the federal constitution in our courts. The rights that many free-staters died facedown in the mud to secure are rarely treated as sovereign rights

independent of the federal constitution. Time and again the Kansas Supreme Court has acknowledged its authority "to interpret our Kansas Constitution in a manner different than the United States Constitution has been construed," and yet the Court has "not traditionally done so."[8]

This article aims to promote state constitutionalism in Kansas, and to offer a few tools and cautionary notes to those lawyers and courts who wish once again to see "Kansas at this time place herself proudly and firmly upon the ancient doctrine of State rights."[9]

State versus federal constitutionalism

In its early opinions, the Kansas Supreme Court routinely interpreted the Kansas constitution as an independent document with force of its own. The Court only mentioned the federal constitution in passing (if at all) and treated interpretations of that document as having no more authoritative value than other interpretive tools such as Kansas history, the practices of sister states, common law, treatises, and public policy.[10]

All that changed in the early 1960s, when the United States Supreme Court began to hold that selected provisions of the federal Bill of Rights had been incorporated through the Fourteenth Amendment to bind the states.[11] The Kansas Supreme Court had previously—and appropriately—been the sole and final arbiter of the Kansas constitution. But after incorporation, it suddenly began construing our state constitutional provisions in lockstep with the United States Supreme Court's construction of similar federal provisions—as though the mere act of incorporation had stripped the Kansas high court of its authority to interpret and enforce the Kansas constitution.[12] Today the Kansas courts for the most part interpret Kansas constitutional provisions independently only when they lack a federal counterpart[13] or when their federal counterpart has not yet been held applicable to the states.[14] [15]

In the aftermath of incorporation, United States Supreme Court Justice William J. Brennan called upon state courts to recognize that state constitutions "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[16] Ever since, other state courts have struggled to develop a coherent methodology of state constitutionalism.[17] But despite Kansas' proudly forward-looking history, the Kansas Supreme Court has only occasionally joined in that struggle.

Why should Kansas courts recognize that the Kansas constitution has independent meaning?

The Kansas Supreme Court has previously warned that any interpretation of the Kansas constitution should aim to "achieve a consistency so that it shall not be taken to mean one thing at one time and another thing at another time."[18] But by tying our constitution's interpretation to that of the federal constitution, our Supreme Court has guaranteed that our constitution will be "taken to mean one thing at one time and another thing at another time."[19] Over the past two centuries, the United States Supreme Court has reversed itself in the range of 200-300 times.[20] Only by interpreting our constitution independently of the federal constitution can our courts ensure that the Kansas document "stands today and should stand tomorrow, staunch and rigid in its restraints upon governmental powers in our system of democracy."[21]

Recognizing that the Kansas constitution has independent meaning also safeguards and advances several important aspects of "Our Federalism."[22] It recognizes that federalism rejects "centralization of control over every important issue in our National Government and its courts."[23] It recognizes the superior practical competence of state courts to decide issues of local concern.[24] And it is an important assertion of state sovereignty. Treating a state constitution as "simply a mirror image of the Federal Constitution" relinquishes "an important incident of this State's sovereignty," and makes it "less of a State than its sister States who recognize the independent significance of their Constitutions."[25]

Invoking state sovereignty as a basis for independently interpreting a state constitution frees up state courts in two important ways. First, courts that recognize the sovereign nature of state constitutions need not be overly concerned if the state constitution is textually similar—or even identical—to its federal counterpart.[26] And second, courts with a healthy respect for state sovereignty may grant a state constitutional claim even if the United States Supreme Court has denied a federal constitutional claim in the very same case.[27]

Finally, developing a robust state constitutional jurisprudence will ensure that Kansas' voice is heard when the United States Supreme Court looks to the states in developing its own constitutional jurisprudence.[28]

How should Kansas courts independently interpret the Kansas constitution?

One approach to interpreting a state constitution is by recognizing its force as a freestanding authoritative document and analyzing its meaning using traditional interpretive tools.[29] The New Jersey Supreme Court, for example, reads its state constitution through the lens of the state's "constitutional history," "legal traditions," "strong public policy," and any "special state concerns" warranting vindication of state constitutional rights.[30] The supreme courts of Pennsylvania, Vermont, Washington, and Connecticut follow similar approaches.[31]

Another approach is to invoke the state constitution when it appears that the United States Supreme Court's interpretation of the federal constitution has left the basic rights of a given state's citizens underprotected. Many courts have rejected United States Supreme Court precedent under their own constitutions irrespective of textual differences, historical traditions, or a unique state per-

spective. For example, in *People v. Batts*, the California Supreme Court rejected the federal approach to double-jeopardy claims under the state constitution.[32] The court observed that the "federal test, standing alone, is insufficient" to protect a defendant's double-jeopardy interests, and cited similar rulings from sister state courts.[33]

The Kansas Supreme Court has never explicitly adopted any guidelines for deciding when and how the Kansas constitution might protect Kansas citizens even when the federal constitution does not. But it has hinted that it will only resort to state constitutionalism if and when the United States Supreme Court has "retreated" from a protective position previously held by that Court.[34] The unfortunate flip side of this approach is that Kansas citizens are left wholly unprotected by their state constitution in circumstances when the United States Supreme Court has *consistently* underprotected a basic right (i.e., when it has never held a protective position from which to retreat). And this approach gives short shrift to Kansas sovereignty, as it conditions our constitution's interpretation entirely on what happens in the United States Supreme Court.

Raising a state constitutional claim and insulating state constitutional remedies from federal review.

Recent opinions in both Kansas and the United States Supreme Court have important lessons to teach both litigants and courts about how to raise and decide state constitutional claims. In the Kansas case *State v. Gomez*, for instance, the defendant argued on appeal that his sentence was disproportionate under both the state and federal constitutions.[35] The Kansas Supreme Court declined to decide either claim. The Court held that Gomez waived his state claim by not raising and developing the issue in the district court.[36] More importantly, it held that he abandoned his federal claim by not briefing it on appeal separately from and independently of his state claim.[37]

In *Florida v. Powell*, the United States Supreme Court reversed a Florida Supreme Court decision, holding that the state had violated Defendant Powell's federal constitutional rights by reading him an incomplete *Miranda* warning.[38] Powell had argued that the Florida court's opinion was based on an independent and adequate state ground (the Florida constitution), and thus the United States Supreme Court had no jurisdiction to review or reverse Florida's decision.

The United States Supreme Court rejected that argument and suggested that a state constitutional decision will only be immune from federal review if (1) the state court explicitly finds the state constitution to be more protective than the federal constitution, and (2) the state analysis is set out separately from the federal analysis:

> Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in Miranda.[39]

The lesson of *Gomez* and *Powell* is that litigants raising state constitutional claims should argue those claims wholly apart from any parallel federal constitutional claims. Doing so will ensure that both claims are heard and that any state constitutional wins are insulated from federal review. Arguing the claims separately will also serve to emphasize the independent and sovereign nature of the Kansas constitution.

Conclusion

When it comes to constitutional questions, "why should we assume that the United States Supreme Court is a Delphic Oracle, that it is the only supreme court in the country able to offer an insightful solution to a difficult problem?"[40] Kansas citizens are "doubly blessed" with the protections of two separate and independent constitutions—one state and one federal.[41] But the Kansas constitution has taken a back seat to its federal counterpart in recent decades. The Kansas Supreme Court is no less powerful now to interpret the Kansas constitution than it was in Kansas' early days. The interests of federalism and the rights of all Kansans will be better served by the development of a robust independent state constitutional jurisprudence. ▲

Endnotes

* *In Part II of this article (to be published at a later date), the authors will walk readers through a sample state constitutional argument.*

1 "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Bill of Rights § 1.

2 Wyandotte Constitutional Convention 273-74 (1859).

3 *Id.* at 276-79.

4 *Id.*

5 *Id.* at 285.

6 Kan. Const. Art. 15 § 6, § 9; Kan. Bill of Rights § 1, § 6.

7 Hon. Robert Stone, *Kansas Laws and Their Origins*, A Standard History of Kansas and Kansans 949 (1918).

8 *State v. Crow*, 266 Kan. 690, 698 (1999), *overruled on other grounds by State v. Laturner*, 289 Kan. 727 (2009) .

9 Wyandotte Constitutional Convention 276-79 (1859).

10 *See, e.g., State v. Gleason*, 32 Kan. 245 (1884) (relying on Kansas cases, other state cases, English common law, and a Fourth Amendment treatise to hold that a complaint and warrant issued on less than probable cause violated the Kansas constitution); *State v. White*, 44 Kan. 514, 520 (1890) (relying on Kansas history and "punishment common in all civilized countries" to hold that hard labor for statutory rape did not violate Kansas Constitution); *State v. King*, 71 Kan. 287 (1905) (interpreting Kansas's constitutional probable-cause requirement by reference to Kansas cases, a California case, and public policy); *State v. Gillmore*, 88 Kan. 835, 845 (1913) (relying on Wisconsin penalty of "six months

in jail on bread and water," to hold that hard labor for desertion of wife did not violate Kansas Constitution); *Ex Parte MacLean*, 147 Kan. 678, 681 (1938) (relying on treatises and Kansas cases to hold that consecutive sentences did not violate Kansas Constitution).

11 *See McDonald v. Chicago*, No. 08-1521, ___ U.S. ___, 2010 WL 2555188 (U.S. June 28, 2010) (tracing history of incorporation).

12 *See, e.g.*, *State v. Wood*, 190 Kan. 778, 788 (1963) ("the command of the Fourth Amendment in the Federal Constitution to federal officers is identical to the command of Section 15 of the Kansas Bill of Rights to law enforcement officers in Kansas"); *State v. Coutcher*, 198 Kan. 282, 287-89 (1967) (defendant challenged habitual criminal act under both Kansas Constitution and Eighth Amendment; court relied on United States Supreme Court cases to reject challenge without distinguishing between constitutions); *State v. Kilpatrick*, 201 Kan. 6, 18-19 (1968) (defendant challenged death by hanging under both Kansas Constitution and Eighth Amendment; court rejected challenge because "the United States Supreme Court has upheld every method of execution").

13 *See Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 311-318 (2005) (noting that federal constitution contains no fundamental right to education, and discussing at length whether Kansas constitution contains such a right; relying on Kansas constitutional structure and history and other state court opinions) (Beier, J., concurring).

14 *See State v. Knight*, 42 Kan. App. 2d 893 (2009) (noting that "the Second Amendment is not incorporated in the Due Process Clause and thereby enforceable against the states," and thus relying on Kansas cases to conclude that concealed-firearms ban did not violate Kansas constitution), *pet. for rev. pending*. In June of this year, the United States Supreme Court held for the first time that the Fourteenth Amendment incorporates the Second Amendment. *McDonald v. Chicago*, No. 08-1521, ___ U.S. ___, 2010 WL 2555188 (U.S. June 28, 2010). It will be interesting to see whether Kansas's constitutional right to bear arms will now be interpreted in lockstep with the federal right.

15 Two notable exceptions appear in cases involving disproportionate sentences and equal protection. *See State v. McDaniel*, 228 Kan. 172, 185 (1980) ("reconsider[ing] . . . reliance on the Eighth Amendment," and concluding that, unlike the Eighth Amendment, the Kansas constitution could "be invoked against an excessive or disproportionate sentence" as defined by Kansas caselaw); *State v. Weigel*, 228 Kan. 194, 203 (1980) (same; reasoning that "we are not inclined to give up our judicial prerogative of examining disproportionate sentences" under the Kansas constitution); *Farley v. Engelken*, 241 Kan. 663, 671, 674 (1987) (holding in equal-protection case that "the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution"); *but see State v. Bolton*, 274 Kan. 1, 17 (2002) (refusing to extend *Farley* to equal-protection claim that prosecutor improperly struck African American jurors during voir dire in criminal case).

16 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harvard L. Rev. 489, 491 (1977); *see also* Daniel E. Monnat & Paige A. Nichols, *"Oh Give Me A Home Where the Government Can't Roam…": Interpreting the Kansas Constitution to Protect "Open Fields,"* J. Kan. Trial Law. Ass'n, Nov. 1994, at 17 (urging Kansas courts to heed Brennan's call, especially as to unreasonable searches and seizures of "persons and property").

17 *See generally* Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses (4th ed. 2006). Recent state constitutional decisions of interest include *State v. Vondehn*, ___ P.3d ___, 2010 WL 2607155 (Or. July 1, 2010) (interpreting state counterpart to Fifth Amendment more protectively); *People v. Devone*, ___ N.E.2d ___, 2010 WL 2265212 (N.Y. App. June 8, 2010) (interpreting state counterpart to Fourth Amendment more protectively); *State v. Cox*, 781 N.W.2d 757 (Iowa 2010) (interpreting state due-process clause more protectively than federal counterpart as interpreted by lower federal courts). For discussions of these and similar state constitutional cases, see the state constitutional law page at http://kansas-defenders.blogspot.com/.

18 *State v. Nelson*, 210 Kan. 439, 445 (1972).

19 Friesen, *supra* note 17 at 1-46 ("Conforming to federal rulings offers short term convenience but may achieve only a temporary stability. Practical and logical problems arise when the United States Supreme Court changes the adopted doctrine.").

20 Monroe H. Friedman, 31 Hofstra L. Rev. 1167, 1173 (2003) (noting that by 2003, the Rehnquist court alone had "overruled prior authority in over forty cases"); *see also* http://www.gpoaccess.gov/constitution/html/scourt.html (listing 204 United States Supreme Court opinions overruling prior opinions between 1810 and 1992).

21 *State v. Hines*, 163 Kan. 300, 301 (1947).

22 *Younger v. Harris*, 401 U.S. 37, 44 (1971).

23 *Id.*; *see also* Justin Long, Intermittent State Constitutionalism, 34 Pepp. L. Rev. 41, 89-91 (2006) (noting that even intermittent state constitutionalism reassures state citizens "that Washington, D.C. does not exercise plenary power over every matter of public importance."

24 Steve McAllister, *Comment, Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 Kan. L. Rev. 593, 613 (1987) ("Because state courts have better knowledge and understanding of local conditions and attitudes, they can tailor their interpretations to enforce constitutional protections aggressively where the United States Supreme Court lacks the familiarity to do so.").

25 *Sanders v. State*, 585 A.2d 117, 145-46 (Del. 1990).

26 *See State v. Dubose*, 699 N.W.2d 582, 597 (Wis. 2005) ("While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary."); Friesen, *supra* note 17 at 1-48 n.200 ("Differences of text, history, or other factors, though they are important in guiding an independent interpretation, are not necessary to justify one.").

27 *See, e.g., Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985) (finding state constitutional violation on remand from United States Supreme Court after that Court rejected state court's reading of Fourth Amendment); *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983) (barring defendant's retrial on double-jeopardy grounds under state constitution after United States Supreme Court rejected federal constitutional claim in same case).

28 *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 570-71, 576 (2000) (looking to state court decisions interpreting state constitutions to determine federal constitutionality of sodomy statute); *see also* Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional*

Law, 34 Okla. City U. L. Rev. 165, 177 (2009) ("Let the state courts be the initial innovators of constitutional doctrines if and when they wish, and allow the United States Supreme Court to pick and choose from the emerging options.").

29 *See generally* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984).

30 *State v. Williams*, 459 A.2d 641, 650 (N.J. 1983).

31 *See Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (text and history of state provision, case law interpreting state provision, case law from other states, and policy considerations "including unique issues of state and local concern"); *State v. Jewett*, 500 A.2d 233, 225-27 (Vt. 1985) ("historical materials," "[t]he textual approach," "a sibling state approach," and "economic and sociological materials," as well as "the historical, the textual, the doctrinal, the prudential, the structural, and the ethical" types of arguments); *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) ("(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern"); *State v. Geisler*, 610 A.2d 1225, 685-86 (Conn. 1992) (text, state precedent, federal precedent, precedent from other states, historical analysis—"including the historical constitutional setting and the debates of the framers"—and economic/sociological considerations), *abrogated on other grounds by State v. Brocuglio*, 826 A.2d 145 (Conn. 2003).

32 134 Cal. Rptr. 2d 67, 86-95 (Cal. 2003).

33 Id.; accord State v. Mariano, 160 P.3d 1258, 1268 (Haw. App. 2007) ("We cannot condone the parsimonious Fourth Amendment protection the Supreme Court doled out in [New York v.] Harris"); People v. LaValle, 817 N.E.2d 341, 365 (N.Y. App. 2004) (rejecting United States Supreme Court precedent in capital case as "unfaithful to the often repeated principle that death is qualitatively different and thus subject to a heightened standard of reliability").

34 See State v. Scott, 286 Kan. 54, 97 (2008) (refusing to find state constitution more protective than federal constitution in capital case; reasoning that United States Supreme Court case upholding Kansas capital statute under federal constitution "was not a decision in which the United States Supreme Court created a new legal principle deviating or retreating from its prior capital sentencing jurisprudence"); State v. McDaniel, 228 Kan. 172, 185 (1980) (choosing to interpret state constitution more protectively than federal constitution as to non-capital disproportionate-sentencing claims; reasoning that recent United States Supreme Court case rejecting disproportionality analysis was a "retreat from the philosophy" of that Court—a philosophy on which Kansas cases had relied).

35 No. 101,213, ___ Kan. ___, 2010 WL 2696623 (July 9, 2010).

36 Id., 2010 WL 2696623 at *7-8.

37 Id. at *7.

38 ___ U.S. ___, 130 S.Ct. 1195 (2010).

39 Id., 130 S.Ct. at 1202.

40 Sutton, supra note 28 at 175.

41 Judith S. Kaye, A Double Blessing: Our State and Federal Constitutions, 30 Pace L. Rev. 844, 854 (2010).

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