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NOTES

STATE CRIMINAL PROCEDURE RIGHTS: HOW MUCH SHOULD THE U.S. SUPREME COURT INFLUENCE?

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This Note is about state court interpretation of state constitutional provisions that relate to prosecutorial summation arguments. This Note finds that when the U.S. Supreme Court rules on a prosecutorial summation issue, state court interpretations of their state constitutional provisions are less diverse than when the Supreme Court does not issue an opinion. When state courts interpret their own constitutional provisions after Supreme Court precedent has been disseminated, they give more interpretative weight to the Supreme Court opinion than any other sister state precedent. This Note uses prosecutorial summation arguments to illustrate why state courts should refrain from placing greater interpretive weight on Supreme Court precedent when interpreting their state constitutions, since state courts have more expertise and authority in the area of state criminal trial procedure.

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INTRODUCTION

State court criminal defendants derive their rights from both the U.S. Constitution and the constitutions of their states.[1] Sometimes the language of the federal and state constitutions is identical, and other times the language differs significantly.[2] In either case, the rights that defendants derive from

1. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 392 (1998).

2. For example, the Fifth Amendment to the U.S. Constitution reads, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The counterpart in the Maryland Declaration of Rights, at article 24, reads: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property,

these two constitutional sources are usually the same, despite differing language or differing drafter intentions.[3] Yet, the American judiciary has explicitly rejected the idea of state constitutional universalism,[4] and the balance between the federal judiciary and state judiciary is still biased toward the authority of the U.S. Supreme Court.[5]

Before the Supreme Court's selective incorporation[6] of the federal Bill of Rights against the states through the Fourteenth Amendment, the only individual rights at the state level were derived from state constitutions.[7] The movement known as "New Judicial Federalism" is thus viewed as a rediscovery of these state constitutional rights beginning in the 1970s after most of the Bill of Rights had been incorporated.[8] Although New Judicial Federalism sought to shift the focus of individual rights back to the state constitutions as alternative or additional sources of individual rights, "state courts generally do not blaze their own trails but instead follow the federal lead."[9] This federal bias is illustrated by the fact that when the Supreme Court rules on an issue, most state courts conform to this precedent when interpreting state constitutions, but when the Supreme Court does not rule on an issue, state courts vary much more when interpreting state constitutions.[10]

Although this pattern is evident in the state courts' holdings, the opinions do not explicitly acknowledge or explain why state courts appear to be compelled to follow federal precedent when interpreting their own constitutions.[11] Regardless of the reasons state courts may feel compelled to follow the holdings of the Supreme Court, there are several federalist considerations and values that demand state courts give the Supreme Court no more persuasive weight than the reasoning of their sister state courts.

Prosecutorial summation issues involve various rights of defendants and duties of prosecutors as state actors. These issues are particularly murky, as

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but by the judgment of his peers, or by the Law of the land." MD. CONST. DECLARATION OF RIGHTS art. XXIV.

3. *See* Schapiro, *supra* note 1, at 390–91.

4. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833); *see also* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 30–31 (2005) (defining constitutional universalism as "the belief that all American constitutions are drawn from the same set of universal principles of constitutional self-governance").

5. *See* Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 557–58.

6. Since the U.S. Bill of Rights was only originally intended to protect the enumerated rights from federal government interference, the Supreme Court, over several decades, "selectively incorporated" certain rights to be protected from state government interference as well. THOMAS C. MARKS JR. & JOHN F. COOPER, STATE CONSTITUTIONAL LAW IN A NUTSHELL 34–35 (2d ed. 2003).

7. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 113 (2009).

8. *Id.* at 113–14.

9. Schapiro, *supra* note 1, at 390–91.

10. *See infra* Part I.A; *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–75 (2018) (describing the pattern of state court "lockstepping" with federal precedent).

11. *See infra* Part I.B; *see also* GARDNER, *supra* note 4, at 12.

they often involve balancing the rights of the accused with the duties of the state.[12] This Note focuses on the constitutional issues surrounding prosecutorial summation arguments in particular because of their potential to elicit a range of judicial considerations at the federal, state, and local levels. An analysis of a different area of criminal trial procedure could produce different judicial patterns and conclusions.

Part I of this Note will illustrate that, since the Supreme Court rarely opines on prosecutorial summation issues, significant variation in state court interpretations of their constitutional provisions is the norm, but when the Supreme Court does rule on a prosecutorial summation issue, such as in *Portuondo v. Agard*[13] and *United States v. Robinson*,[14] state courts conform to those rulings without individual analysis of the states' constitutional language. Part II explores the competing considerations underlying why state court judges may feel compelled to conform to or diverge from Supreme Court precedent. Finally, Part III will argue that, although state courts may conform to federal precedent for valid reasons, there are several overriding reasons why they should refrain from overemphasizing Supreme Court precedent, especially in the context of prosecutorial summation issues.

I. STATE COURT BEHAVIOR IN RELATION TO U.S. SUPREME COURT RULINGS ON PROSECUTORIAL SUMMATION ISSUES

Two general patterns emerge when analyzing the relationship between federal and state court precedent. First, if the Supreme Court does not promulgate a ruling, state court interpretations are varied.[15] Second, when the Supreme Court does promulgate a ruling, state courts often conform to that precedent.[16] This part uses specific prosecutorial summation issues and cases to illustrate these two patterns of state court behavior.

A. No Supreme Court Ruling: State Court Variation as the Norm

The Supreme Court receives between 7000 and 8000 petitions for certiorari each term.[17] The Court only grants review with oral arguments by attorneys in about eighty of these cases.[18] Of these cases,[19] only a fraction

12. *See* United States v. Hasting, 461 U.S. 499, 506–07 (1983) (stating the Court's analysis of prosecutorial conduct must "balanc[e] the interests involved").

13. 529 U.S. 61 (2000) (holding that when a defendant takes the stand, a prosecutor may always discredit the defendant on summation by arguing the defendant tailored testimony to the evidence presented at trial).

14. 485 U.S. 25 (1988) (holding that a prosecutor's summation comments that the defendant could have taken the stand and explained his side of the story did not violate his Fifth Amendment right against compulsory self-incrimination, since the remarks fairly responded to defense counsel's summation).

15. *Infra* Part I.A.

16. *Infra* Part I.B.

17. *The Supreme Court at Work: The Term and Caseload*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/courtatwork.aspx [https://perma.cc/5LVF-M2TR] (last visited Nov. 3, 2020).

18. *Id.*

19. *See id.*

deal with state criminal trial procedure and an even smaller fraction deal with prosecutorial summation rules in particular.[20] Thus, of the vast majority of prosecutorial summation issues that may arise, the Supreme Court has directly addressed only a handful. This section provides examples of state court behavior when, as is the norm, the Supreme Court does not rule on a particular prosecutorial summation issue. The examples show that state court variation on prosecutorial summation issues is typical state court behavior.

The Supreme Court has not directly addressed the issue of a prosecutor's use of a personal opinion about the defendant's guilt in summation arguments.[21] Thus, states vary in their rules on the use of personal opinion as to defendants' guilt in prosecutorial summation speeches.[22] Nineteen states find that any use of personal opinion in summation arguments is improper.[23] Twenty-eight states find that use of a prosecutor's personal opinion regarding a defendant's guilt in summation arguments is proper only if it is supported by the evidence.[24] Four other states still have unsettled law on this issue.[25]

When state courts do not have Supreme Court precedent to use as guidance, they look to other sources of legal authority, such as sister state courts or American Bar Association (ABA) rules and guidelines. For example, the Supreme Court of Alabama used language from the New York and Michigan courts to justify its ruling that it is never proper for prosecutors to state their personal beliefs as to the guilt of the accused in argument.[26] The Alabama Supreme Court further bolstered this reasoning by using Canons Five and Fifteen of the ABA Canons of Professional Ethics.[27] The North Dakota Supreme Court also cites to dozens of state court cases in coming to the conclusion that prosecutorial summation remarks regarding the

20. For example, in the 2018 term, the Supreme Court considered seventy-two cases and only four of those cases concerned state criminal trial procedure. *See SCOTUS Statistics*, HARV. L. REV., https://harvardlawreview.org/supreme-court-statistics [https://perma.cc/Z5CF-UWP7] (last visited Nov. 3, 2020).

21. In *United States v. Young*, 470 U.S. 1, 6–7 (1985), the Court touched on this issue but limited its ruling to whether or not the prosecutor's personal opinion of the defendant's guilt amounted to plain error, not whether the prosecutor's comments were inappropriate as the lower courts had previously determined.

22. *See* Gregory G. Sarno, Annotation, *Propriety and Prejudicial Effect of Prosecutor's Argument to Jury Indicating His Belief or Knowledge as to Guilt of Accused—Modern State Cases*, 88 A.L.R.3d 449 (1978).

23. *See id.* Those states are Alabama, Arizona, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, New York, North Dakota, Oregon, Pennsylvania, Virginia, and West Virginia. *Id.*

24. *See id.* Those states are Alaska, Arkansas, California, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, and Wyoming. *Id.*

25. *See id.* Those states are Florida, Louisiana, Texas, and Vermont. *Id.*

26. Adams v. State, 198 So. 2d 255, 257 (Ala. 1967).

27. *Id.* Canon Five of the ABA Canons of Professional Ethics states, "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." CANONS OF PROF'L ETHICS Canon 5 (AM. BAR ASS'N 1908). Canon Fifteen states, "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." *Id.* Canon 15.

prosecutor's personal opinion are impermissible unless evidence supports the opinion.[28] The North Dakota Supreme Court also uses the ABA Canons and a treatise on criminal procedure to justify its position.[29] The Oklahoma Court of Criminal Appeals also weighed various sister state court rulings extensively when considering its formulation of a rule on prosecutorial use of personal opinion in summation remarks.[30] After describing in detail no less than nine other state court holdings, the Oklahoma court concluded, "[w]e could fill a volume of quotations to the same effect from both American and English reports, but deem these sufficient" to support the ruling that prosecutors may not use personal opinion in summation arguments unless the evidence supports such an opinion.[31]

On the other hand, some courts solely rely on their own authority in promulgating rules on prosecutorial summation issues. For example, the Minnesota Supreme Court did not cite a single authority in holding that a prosecutor is "never justified in thrusting his personality into the case, and expressing his opinion that the defendant is guilty."[32] The Arizona Supreme Court cited only itself in cases with parallel, yet not controlling, facts dealing with prosecutorial summations before concluding, "[i]n our state the prosecuting attorney should not in his argument . . . submit his personal opinion."[33]

State courts do not give much weight to lower federal courts' rulings on this prosecutorial summation issue. Even though nearly every circuit court has ruled on this issue, the state courts in each circuit are still split on when allowing personal opinions in prosecutorial summation arguments is improper.[34] For example, the Second Circuit is comprised of Vermont, New York, and Connecticut.[35] In *United States v. Carr*,[36] the Second Circuit held that a prosecutor's personal views are altogether prohibited in summation arguments.[37] Yet, Vermont's case law on this issue is still unsettled,[38] while

28. State v. Gunderson, 144 N.W. 659, 660 (N.D. 1913) (holding the following prosecutorial remarks were impermissible statements of personal opinion: "I do not come here to try a case unless the defendant is guilty").

29. *Id.*

30. Williams v. State, 114 P. 1114, 1119–22 (Okla. Crim. App. 1910).

31. *Id.* at 1122.

32. State v. Clark, 131 N.W. 369, 370 (Minn. 1911).

33. State v. Titus, 152 P.2d 129, 131 (Ariz. 1944).

34. *See generally* United States v. Miller, 799 F.3d 1097 (D.C. Cir. 2015); United States v. Thompson, 482 F.3d 781 (5th Cir. 2007); United States v. Carr, 424 F.3d 213 (2d Cir. 2005); United States v. Higgs, 353 F.3d 281 (4th Cir. 2003); United States v. Hermanek, 289 F.3d 1076 (9th Cir. 2002); Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); United States v. Renfro, 600 F.2d 55 (6th Cir. 1979).

35. 28 U.S.C. § 41.

36. 424 F.3d 213 (2d Cir. 2005).

37. *Id.* at 227.

38. *See* State v. Parker, 162 A. 696, 699 (Vt. 1932) (citing with approval cases that express the view that prosecutors' personal opinions are always prohibited and also cases that express the view that prosecutors' personal opinions are permitted if based on the evidence presented at trial).

New York[39] and Connecticut[40] follow this ruling. Additionally, the Fifth Circuit is comprised of Texas, Louisiana, and Mississippi;[41] Texas[42] and Louisiana[43] case law is still unsettled on this issue, even though the Fifth Circuit has ruled that prosecutors may not express their personal opinions unless their opinions are based on the evidence.[44] Mississippi follows the Fifth Circuit's logic.[45] Although the above analysis encompasses only one prosecutorial summation issue, it is generally illustrative of state court behavior when the Supreme Court has not promulgated a ruling.[46]

B. Supreme Court Ruling: More Uniform State Court Opinions

Although it is relatively uncommon, the Supreme Court has opined on several prosecutorial summation issues.[47] When the Supreme Court does promulgate a ruling, the state courts behave differently than when no Supreme Court precedent exists. This section demonstrates that when the Supreme Court does rule on a prosecutorial summation issue, the state courts often conform to the federal precedent. Through two Supreme Court cases and corresponding state court opinions, this section illustrates the powerful influence federal precedent has on shaping state court constitutional interpretations regarding prosecutorial summation issues.

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39. People v. Lovello, 136 N.E.2d 483, 484 (N.Y. 1956).

40. Jenkins v. Comm'r of Corr., 726 A.2d 657, 665 (Conn. App. Ct. 1999).

41. 28 U.S.C. § 41.

42. *Compare* Clayton v. State, 502 S.W.2d 755, 756 (Tex. Crim. App. 1973) (holding a prosecutor's argument that he was not paid enough to prosecute defendants whom he did not know to be guilty was improper), *with* Shipp v. State, 482 S.W.2d 870, 871 (Tex. Crim. App. 1972) (holding a prosecutor's argument that "[i]t has been my experience that the stronger the State's case is we bring you, the more desperate and more ridiculous the defenses are," was a permissible comment).

43. *Compare* State v. Landry, 262 So. 2d 360, 362 (La. 1972) (holding the prosecutor's personal interpretation of the facts was permissible because his comments did not imply personal knowledge of the facts), *with* State v. Kaufman, 304 So. 2d 300, 307 (La. 1974) (holding the prosecutor's personal opinion is only permitted in summation if it is clear to the jury his opinion is solely based on the evidence presented at trial).

44. United States v. Thompson, 482 F.3d 781, 786 (5th Cir. 2007).

45. Long v. State, 141 So. 591, 594 (Miss. 1932).

46. *See* J. Evans, Annotation, *Comment or Argument by Court or Counsel that Prosecution Evidence Is Uncontradicted as Amounting to Improper Reference to Accused's Failure to Testify*, 14 A.L.R.3d 723 (1967) (detailing varied state rulings in criminal cases where prosecutors comment that their evidence is uncontradicted); William B. Johnson, Annotation, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witness—State Cases*, 45 A.L.R.4th 602 (1986) (detailing varied state rulings in criminal cases where prosecutors comment on the credibility of law enforcement officials as witnesses).

47. *See generally* United States v. Young, 470 U.S. 1 (1985) (holding prosecutor's remarks regarding his personal opinion of defendant's guilt did not amount to plain error); United States v. Hasting, 461 U.S. 499 (1983) (holding that when a court considers if a prosecutor's reference to the defendants' failure to testify requires reversal, the court must consider if it was clear beyond a reasonable doubt that the jury would have returned a guilty verdict); Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (holding a prosecutor's ambiguous remark about the defendant's guilt was improper but mitigated by a curative instruction).

1. *Portuondo v. Agard*

The Supreme Court has held that prosecutors may always argue defendants tailored their testimony to the evidence presented at trial, no matter how little evidence prosecutors may have to support this argument.[48] After the Supreme Court so held, most state courts interpreted state constitutional provisions in line with this ruling.[49] Only five states have interpreted their state constitutions differently than the Supreme Court interpreted the U.S. Constitution in this case.[50] Four of those states followed the dissenting opinion of the case,[51] and only one state promulgated a holding that no Supreme Court Justice stated.[52]

In 2000, the Supreme Court promulgated its decision in *Agard*.[53] The Court granted certiorari after the Second Circuit held that a prosecutor's summation remarks violated the respondent's Fifth, Sixth, and Fourteenth Amendment rights.[54] At trial, the prosecutor said, "You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies."[55]

Writing for the majority, Justice Antonin Scalia reasoned that the prosecutor's comments concerned the respondent's credibility as a witness and were therefore in line with the long-standing doctrine that when a defendant voluntarily assumes the role of a witness, the defendant's credibility may be impeached.[56] Justice Scalia rejected the argument that the comments' generic nature made them unconstitutional.[57] The majority reasoned that the comments "simply set forth a consideration the jury was to have in mind when assessing the defendant's credibility," which prior case law supported.[58]

Justice John Paul Stevens wrote the concurring opinion, in which he agreed the prosecutor's summation likely did not meet the high threshold of a serious trial error but nonetheless stated that comments of that type "should be discouraged rather than validated."[59] Justice Stevens explicitly noted that state courts and trial judges have the power to create their own rules about this type of comment in prosecutorial summation speeches, despite the Court's ruling in this case.[60]

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48. *See* Portuondo v. Agard, 529 U.S. 61, 69 (2000).
49. *See infra* notes 94–102 and accompanying text.
50. *See infra* notes 63–70 and accompanying text.
51. *See infra* notes 71–89 and accompanying text.
52. *See infra* notes 90–92 and accompanying text.
53. 529 U.S. 61 (2000).
54. *Id.* at 65.
55. *Id.* at 64.
56. *Id.* at 69 (citing Brown v. United States, 356 U.S. 148, 154 (1958)).
57. *Id.* at 70–71.
58. *Id.* at 71.
59. *Id.* at 76 (Stevens, J., concurring).
60. *Id.*

Writing for the dissent, Justice Ruth Bader Ginsburg voiced strong opposition to the majority's ruling: "The Court today transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility."[61] The dissent agreed with the Second Circuit's prohibition on generic tailoring accusations and allowance of specific arguments about the fit between the defendant's testimony and other witnesses' testimony.[62]

Despite Justice Stevens's call for state courts to independently interpret prosecutorial summation speech rules (especially regarding a prosecutor's emphasis on a defendant's presence at trial),[63] only five states have expanded on this federal precedent, and only one has used its state constitution to do so.[64] The five states are Colorado,[65] Hawaii,[66] Massachusetts,[67] Minnesota,[68] and New Jersey,[69] with Hawaii being the only state to rely on its state constitution.[70] All other states with opinions on this issue have conformed to the Supreme Court's holding.

Colorado, Hawaii, Massachusetts, and Minnesota have all held that prosecutors' generic tailoring arguments on summation are prohibited, but prosecutors' specific tailoring arguments on summation are permitted.[71] These states all conform to the reasoning provided in Justice Ginsburg's dissenting opinion in *Agard*.[72] In *State v. Mattson*,[73] the Supreme Court of the State of Hawaii explicitly stated it was "persuaded by the reasoning of the *Portuondo* dissent."[74] The Hawaii Supreme Court held that the confrontation clause in article I, section 14 of the Hawaii Constitution is broader than the Supreme Court's interpretation of the U.S. Constitution.[75] Hawaii's confrontation clause prohibits generic tailoring arguments because they "burden the defendant's constitutional right to be present at trial" and "discourage a defendant from exercising his constitutional right to testify on his own behalf."[76]

The Massachusetts, Minnesota, and Colorado courts followed the holding of the *Agard* dissent but held as such using their supervisory authority instead of their state constitutional interpretation authority.[77] In *Commonwealth v.*

61. *Id.* (Ginsburg, J., dissenting).
62. *Id.* at 88.
63. *Id.* at 76 (Stevens, J., concurring).
64. State v. Mattson, 226 P.3d 482 (Haw. 2010).
65. People v. Martinez, 224 P.3d 1026 (Colo. App. 2009).
66. *Mattson*, 226 P.3d 482.
67. Commonwealth v. Gaudette, 808 N.E.2d 798 (Mass. 2004).
68. State v. Swanson, 707 N.W.2d 645 (Minn. 2006).
69. State v. Daniels, 861 A.2d 808 (N.J. 2004).
70. *Mattson*, 226 P.3d at 496.
71. *See supra* notes 65–68 and accompanying text.
72. *See* People v. Martinez, 224 P.3d 1026, 1037 (Colo. App. 2009); *Mattson*, 226 P.3d at 496; *Gaudette*, 808 N.E.2d at 802; *Swanson*, 707 N.W.2d at 657–58.
73. 226 P.3d 482 (Haw. 2010).
74. *Id.* at 496.
75. *Id.*
76. *Id.*
77. *See infra* Part II.B.2 (discussing state courts' inherent supervisory power).

Gaudette,[78] the Massachusetts Supreme Judicial Court declared that it is impermissible for a prosecutor to make tailoring arguments on summation, "unless there is evidence introduced at trial to support that argument."[79] However, the Massachusetts Supreme Court did not make this ruling based on state constitutional language.[80] It promulgated this holding based on prior case law, predating the Supreme Court's ruling in *Agard*, which held this type of summation argument was prejudicial, and the court explicitly declined to consider any state constitutional violation argument.[81]

In *State v. Swanson*,[82] the Minnesota Supreme Court, noting Justice Stevens's concurrence encouraging state courts to consider the question independently as a matter of state law,[83] echoed the Massachusetts court's approach.[84] It held that "although not constitutionally required, the better rule" is prohibiting generic tailoring and allowing specific tailoring in prosecutorial summation arguments.[85]

In *People v. Martinez*,[86] the Colorado Court of Appeals explicitly agreed with Justice Stevens's concurring opinion in *Agard* and opined that generic tailoring arguments defeat the truth-seeking function of the trial process and ignore the constitutional presumption of innocence.[87] The court concluded that the defendant "ha[d] not given [it] a persuasive reason for concluding the Colorado Constitution offers protection to a defendant . . . independent of and supplemental to the protections provided by the United States Constitution."[88] Nevertheless, the court held that "pursuant to [its] supervisory authority," generic tailoring arguments on summation are prohibited, while specific tailoring arguments are permitted.[89]

New Jersey is the only state that did not completely conform to Justice Ginsburg's dissent in *Agard*. It expanded the dissent's logic, holding that generic tailoring arguments during summation are always prohibited and specific tailoring arguments are permitted "but in a limited fashion."[90] Like the state courts mentioned above, the Supreme Court of New Jersey found that specific tailoring arguments must be based on the evidence and reasonable inferences therefrom but under no circumstances can the prosecutor explicitly refer to the defendant's presence at court or ability to hear other witnesses' testimony.[91] The New Jersey court also based its

78. 808 N.E.2d 798 (Mass. 2004).
79. *Id.* at 802.
80. *Id.*
81. *Id.* (citing Commonwealth v. Person, 508 N.E.2d 88, 90–91 (Mass. 1987)).
82. 707 N.W.2d 645 (Minn. 2006).
83. *Id.* at 657.
84. *Id.* at 658 n.2 (citing *Gaudette*, 808 N.E.2d at 801–03).
85. *Id.* at 657–58.
86. 224 P.3d 1026 (Colo. App. 2009).
87. *Id.* at 1036.
88. *Id.* at 1035–36.
89. *Id.* at 1036.
90. State v. Daniels, 861 A.2d 808, 819 (N.J. 2004).
91. *Id.*

holding on its supervisory authority, instead of its state constitutional interpretation authority.[92]

As for the vast majority of states that followed the Supreme Court's *Agard* ruling, the state courts' language shows there is a perceived higher persuasive bar to convince state courts to interpret state constitutions and rules differently than the Supreme Court interprets the U.S. Constitution.[93] Even where the state constitutional language is different from the federal constitutional language, state courts still construe the state constitutional provision at issue to be identical to the relevant federal provision, using federal precedent to support the analysis.[94]

For example, in *People v. Swift*,[95] the New York Court of Appeals disposed of a defendant's claim in one dismissive sentence, concluding "there is no basis upon which to reach a different result as a matter of State constitutional law."[96] The court made no mention of the differences between the federal constitutional language on which *Agard* was based and the New York state constitutional language that would have been at issue there.[97]

In *State v. Bauer*,[98] the Iowa Court of Appeals used similar conclusory language to dispose of a defendant's claims. "[W]e see no reason to deviate from the persuasive reasoning and holding of the Court in *Portuondo* on this issue, which is in accord with Iowa law and has been previously relied on by this court."[99] The court did not provide any further justification for its refusal to analyze the language of the Iowa Constitution with respect to this claim.[100]

In addressing its decision to refrain from using its supervisory authority in this instance, the District of Columbia Court of Appeals stated, "this court's supervisory authority is to be 'sparingly exercised' . . . and we have been given no sound reason to exercise it in this context."[101] These dismissive statements fill state court decisions, "suggesting that state courts . . . have little interest in engaging in intensive and independent interpretation of their

92. *Id.*
93. *See infra* notes 95–102 and accompanying text.
94. GARDNER, *supra* note 4, at 6–8.
95. 708 N.Y.S.2d 611 (App. Div. 2000).
96. *Id.* at 611.
97. Section 6 of the New York Bill of Rights provides, in part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her." N.Y. CONST. art. 1, § 6.
98. No. 16-0265, 2017 WL 3067346 (Iowa Ct. App. July 19, 2017).
99. *Id.* at *4.
100. *See id.* The Iowa Constitution pertaining to the rights of the accused also differs from the language of the U.S. Constitution:

> In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel.

IOWA CONST. art. I, § 10.
101. Teoume-Lessane v. United States, 931 A.2d 478, 495 (D.C. 2007) (quoting Watkins v. United States, 846 A.2d 293, 300 (D.C. 2004)).

state constitutions," when Supreme Court precedent has been promulgated on this prosecutorial summation issue.[102]

2. *United States v. Robinson*

The Supreme Court has held that prosecutors may explicitly a reference defendant's failure to take the stand if the comments are in fair response to defense counsel's remarks.[103] After the Supreme Court created this narrow exception to the Fifth Amendment, most state courts interpreted their Fifth Amendment counterparts in the same way.[104] Only three states have modified their respective constitutional interpretations from this federal precedent.[105]

In 1988, the Supreme Court promulgated its ruling in *Robinson*, holding that no Fifth Amendment violation occurred when a prosecutor, in closing arguments, commented on the defendant's choice not to testify at trial, where the comments responded to the defense counsel's closing remarks.[106] The Sixth Circuit was reversed, having held that the prosecutor's comments deprived the defendant of a fair trial because the reference to the defendant's failure to testify was "direct," so it did not matter that the prosecutor's remarks were responding to defense counsel's remarks.[107] This Supreme Court ruling effectively created a general exception to the blanket constitutional prohibition on using a defendant's silence against him.[108]

Chief Justice William Rehnquist, writing for the majority, reasoned that, because the prosecutor's comments referred only to the "possibility of testifying as one of several opportunities which the defendant was afforded . . . to explain his side of the case" and the prosecutor's comments did not suggest to the jury that the defendant's silence was substantive evidence of guilt, no Fifth Amendment right against compulsory self-incrimination was violated.[109] The Court explicitly rejected the Sixth Circuit's method of examining whether the comment was a direct or indirect reference to the defendant's failure to testify.[110] The Fifth Amendment cannot be used as "a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case."[111] When a prosecutor's remarks are a fair response to defense counsel's claim, reference to the defendant's silence is constitutional.[112]

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102. GARDNER, *supra* note 4, at 12.
103. United States v. Robinson, 485 U.S. 25, 25 (1988).
104. *See infra* notes 128–34 and accompanying text.
105. *See infra* notes 117–23 and accompanying text.
106. *Robinson*, 485 U.S. at 25.
107. *Id.* at 29.
108. *See id.* at 31.
109. *Id.* at 32.
110. *Id.* at 31–32.
111. *Id.* at 32 (citing United States v. Hasting, 461 U.S. 499, 515 (1983) (Stevens, J., concurring)).
112. *Id.*

Justice Thurgood Marshall, writing the dissenting opinion, reasoned that although the majority only carved out a small exception to the bright-line rule that prosecutors may not comment on a defendant's failure to testify, this modification is nonetheless "unsettling and unwarranted."[113] In his view, the exception goes against the plain language of the constitutional standard.[114] Justice Marshall argues that the majority's language, providing that a prosecutor may respond "fairly" to a claim made by defendant's counsel, is problematic because a "fair response" could still be exactly the kind of comment the Fifth Amendment was adopted to prevent.[115] According to Justice Marshall, the Court should have rejected these comments for violating the Fifth Amendment.[116]

Only a handful of states have distinguished their state constitutions from this federal precedent when interpreting their state constitutions' Fifth Amendment rights. In *Adams v. State*,[117] the Alaska Supreme Court placed a higher bar on what warrants a "fair response" from the prosecutor when calling attention to a defendant's silence.[118] The court denied the prosecutor protection under the fair response doctrine articulated in *Robinson* for two reasons: (1) because the defense counsel did not expressly claim that the government denied the defendant the ability to tell his side of the story and (2) because the prosecutor did not expressly state he was responding to defense counsel's express claims of the defendant's inability to tell his side of the story.[119]

The Alaska Supreme Court articulated that the fair response doctrine only affords prosecutors protection if the defense counsel and prosecutor are explicitly responding to one another's remarks.[120] *Robinson* did not require such an explicit indication of a response to defense counsel's statements; thus, Alaska created a higher bar for a prosecutor to be granted protection for improper remarks under the fair response doctrine.

A California appellate court has similarly elevated the fair response standard by requiring that the prosecutor's comment be a "direct and fair response."[121] In *State v. Ellsworth*,[122] the New Hampshire Supreme Court also held that, for a prosecutor to invoke the fair response doctrine when referencing a defendant's failure to testify, defense counsel must have explicitly or implicitly referenced the defendant's failure to testify.[123] These state courts do not simply require a fair response as articulated in *Robinson*

113. *Id.* at 38 (Marshall, J., dissenting).
114. *Id.* at 39.
115. *Id.* at 40.
116. *Id.* at 45.
117. 261 P.3d 758 (Alaska 2011).
118. *See id.* at 769.
119. *Id.*
120. *See id.* at 769–70.
121. People v. Diaz, 255 Cal. Rptr. 91, 97 (Ct. App. 1989) (stating, in a denial for a petition for rehearing, that the prosecutor's comment must be a "direct and fair response" in order for a prosecutor's reference to the defendant's silence to be excused).
122. 855 A.2d 474 (N.H. 2004).
123. *See id.* at 479.

but a direct *and* fair response for a prosecutor to successfully invoke this doctrine.

Maryland explicitly declined to consider whether the fair response doctrine applies to a prosecutor's comments on a defendant's failure to testify.[124] Therefore, it has not yet decided if it will follow the *Robinson* Court's ruling that a response need simply be "fair" to comment on a defendant's silence or create a more exacting standard like those of Alaska, California, and New Hampshire.[125] In the same opinion, the Maryland Court of Appeals explicitly stated that, although article 22 of the Maryland Declaration of Rights is in pari materia[126] with the Fifth Amendment of the U.S. Constitution, it has been interpreted to confer more comprehensive self-incrimination rights than those of the federal Fifth Amendment.[127] This statement seemingly references the court's right to promulgate a more exacting standard than the U.S. Supreme Court promulgated for the fair response doctrine in *Robinson*.

All other state courts with opinions on this issue have not departed from the federal holding, despite such a strong dissenting opinion from Justice Marshall about the eroding of a bright-line constitutional standard.[128] Again, the state courts' language shows there is a perceived higher persuasive bar to convince state courts to interpret their state constitutions and laws differently than the Supreme Court interprets the U.S. Constitution. For example, in *Moore v. State*,[129] the Indiana Supreme Court explicitly acknowledged that the Indiana Constitution is not coextensive with the Fifth Amendment to the U.S. Constitution but nonetheless refused to promulgate a different standard on state constitutional grounds because the defendant supplied no "cogent argument" based on the Indiana Constitution.[130] The Supreme Court of Pennsylvania, quoting *Robinson* extensively, summarily concluded that the fair response doctrine applied to its Fifth Amendment counterpart without any further state constitutional analysis.[131]

In *Wright v. State*,[132] the Mississippi Supreme Court overruled prior holdings that partially relied on its interpretations of U.S. Supreme Court precedent to interpret its own state constitution.[133] It reasoned that, after the *Robinson* Court clarified prior Fifth Amendment doctrine, its prior holdings, relying on both the Mississippi Constitution and the federal Fifth Amendment protections, are overruled to the extent that they do not follow the U.S. Supreme Court's fair response doctrine articulated in *Robinson*.[134]

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124. Marshall v. State, 999 A.2d 1029, 1038 (Md. 2010).
125. *See supra* notes 118–23 and accompanying text.
126. In pari materia means "in the same matter" in Latin. *In pari materia*, BLACK'S LAW DICTIONARY (11th ed. 2019).
127. *Marshall*, 999 A.2d at 1035.
128. *See* United States v. Robinson, 485 U.S. 25, 37–38 (1988) (Marshall, J., dissenting).
129. 669 N.E.2d 733 (Ind. 1996).
130. *Id.* at 739 n.14.
131. *See* Commonwealth v. Trivigno, 750 A.2d 243, 249–50 (Pa. 2000).
132. 958 So. 2d 158 (Miss. 2007).
133. *See id.* at 164.
134. *Id.* at 166 (overruling "*Livingston* and its progeny" since the *Livingston* court erroneously interpreted Supreme Court precedent, as clarified by *Robinson*).

The above examples demonstrate a state court pattern of seemingly blind "lockstepping" to Supreme Court precedent when it has promulgated an opinion on a prosecutorial summation issue.[135] The next part contemplates the potential various state court motivations for this lockstepping, since state courts rarely provide their reasoning for following U.S. Supreme Court precedent.

II. STATE COURT MOTIVATIONS TO FOLLOW OR DIVERGE FROM U.S. SUPREME COURT PRECEDENT

As the language cited in Part I.B demonstrates, state courts do not explicitly acknowledge they are treating Supreme Court precedent differently than state court precedent when interpreting their state constitutions. However, beginning with the Burger Court retrenchments[136] in the 1960s and 1970s and continuing to today, scholars and judges have generated a large body of literature about whether state courts should continue this seemingly blind adherence of state precedent to federal precedent.[137] Writers have devoted less attention to explaining why this convergence of state precedent and federal precedent continues to occur.[138] This part outlines the competing motivations for why state courts may conform to federal precedent or, on the other hand, why state courts may rely on their own authority in the context of the American federalist system. This Note suggests state courts' motivations can be organized into the following four categories: state constitutional interpretive methods, institutional legitimacy concerns, perceived Supreme Court expertise, and the promotion of efficiency through uniformity of federal and state case law.

A. Justifications for State Court Adherence to Federal Precedent

Although state courts do not explicitly state why they choose to conform to U.S. Supreme Court precedent,[139] they must have some motivations for doing so. This section outlines the likely justifications for state court conformity to federal precedent, including federally focused constitutional interpretation methods, the perceived legitimacy garnered from reliance on

135. *See* SUTTON, *supra* note 10, at 174.

136. The Burger Court retrenchments are a series of cases promulgated by many Richard Nixon-appointed judges that resulted in conservative rulings in criminal procedure, equal protection, and First Amendment cases. *See* Tinsley E. Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 37 (1976).

137. This body of literature began to expand with the addition of Justice William Brennan's 1977 article in the *Harvard Law Review*, titled *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). The article is the ninth most-cited law review article of all time. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1307 (2017). Justice Stewart Pollock of the New Jersey Supreme Court called the article "the Magna Carta of state constitutional law." Stewart G. Pollock, Address, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

138. Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 43 (2006).

139. *See supra* Part I.B.

federal precedent, Supreme Court constitutional expertise, and the values of uniformity and efficiency between federal and state law.

1. Interpretive Methods Amplifying the Influence of Federal Precedent

The first explanation for state court conformity to federal precedent is that state court judges analyze state constitutions through a variety of interpretive methods that favor and emphasize federal court reasoning. These interpretive methods begin with two assumptions: first, that there is a relationship between the federal and state constitutions and second, that this relationship involves federal superiority over state precedent. One such state constitutional interpretive approach is that state court judges perceive state constitutional language as derivative of the federal constitution, compelling state judges to look to federal courts for established interpretations.[140] This occurs both where the federal constitutional language is identical to the state counterparts and, more surprisingly, where the state constitutional language differs from the federal language.[141] Despite the differing state constitutional text, state courts still rely on U.S. Supreme Court precedent in construing their own state constitutions.[142] By relying on federal precedent, state courts inherently ignore the intentions of the drafters of the state constitutions and the historical context in which they were drafted.[143]

Another interpretive method that illustrates the state court view that the U.S. Supreme Court is more authoritative is the state courts' application of certain criteria to determine if divergence from federal precedent is warranted.[144] For example, the Washington Supreme Court uses a list of criteria that includes: "(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" to determine if it should diverge from federal precedent.[145] The Illinois Supreme Court considers whether the language of its state constitution justifies a departure from federal precedent.[146] The Supreme Court of California states that "[d]ecisions of the United States Supreme Court . . . are entitled to respectful consideration . . . and ought to be followed unless persuasive reasons are presented for taking a different course."[147] The Supreme Courts of New

140. *See* GARDNER, *supra* note 4, at 6–7; *see also* WILLIAMS, *supra* note 7, at 146–50.

141. GARDNER, *supra* note 4, at 6–8 (providing examples from the Massachusetts and Virginia state courts).

142. *Id.* at 8–9.

143. *Id.* at 9.

144. *See* Liu, *supra* note 137, at 1314.

145. State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (en banc).

146. People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984) (stating that the court will consider "the language of our constitution, or in the debates and the committee reports of the constitutional convention" when determining if there is a valid justification to depart from federal precedent).

147. People v. Teresinski, 640 P.2d 753, 761 (Cal. 1982) (en banc) (citations omitted).

Jersey,[148] Connecticut,[149] and Pennsylvania[150] have similar criteria when deciding whether or not to diverge from federal precedent. These approaches all treat federal precedent with a presumptive correctness that dilutes the validity of original state court reasoning.[151]

These methods of state constitutional interpretation are amplified because it is easier for state judges and their law clerks to research and adhere to federal precedent.[152] Law clerks often graduate from elite law schools that are focused on federal law.[153] When state court law clerks have only been exposed to federal case law, they bring a federal bias to their writing and research that reinforces a natural tendency toward federal precedent.[154] Additionally, there is a dearth of secondary sources about state constitutional law developments and a plethora of secondary sources on federal constitutional law.[155] This imbalance in research resources continues to skew state judicial clerks and judges toward federal case law.[156]

2. State Court Judges Rely on Federal Precedent to Garner Legitimacy

A second explanation for state court conformity to federal precedent is that state court judges are concerned about their perceived legitimacy among the public.[157] Many state court judges are elected or selected to the bench for a set term,[158] unlike the federal judiciary, which is nominated for life.[159] There is evidence that judges and scholars perceive state case law as inferior to federal case law. The idea of state court inferiority to federal courts has long been a sentiment in American government and among the American public.[160] In 1988, a national poll found 52 percent of adults did not know their state had a constitution at all.[161] Academic writings and the media contribute to this image of state courts.[162] "A quick glance at legal literature

148. State v. Hunt, 450 A.2d 952, 955–57 (N.J. 1982) ("Sound policy reasons, however, may justify a departure.").

149. State v. Geisler, 610 A.2d 1225, 1232–34 (Conn. 1992) (listing federal precedent as a tool of analysis in interpreting the state constitution).

150. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (explaining that federal decisions should be given due weight in state constitutional analysis when they are well reasoned).

151. *See* Liu, *supra* note 137, at 1314–15.

152. Charles G. Douglas III, *State Judicial Activism—the New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1137 (1978).

153. *Id.* at 1147.

154. *See id.*

155. *Id.*

156. *Id.*

157. *See* Aldisert, *supra* note 5, at 558 (describing "unfortunate language, disparaging our state judges").

158. *See* MARKS & COOPER, *supra* note 6, at 180–81.

159. U.S. CONST. art. III, § 1.

160. Aldisert, *supra* note 5, at 557–58; *see also* GARDNER, *supra* note 4, at 24 (stating "rulings of state supreme courts are generally poorly understood and poorly covered by the media" and "lawyers . . . have traditionally been extremely reluctant even to raise state constitutional issues or, upon raising them, to brief them thoroughly").

161. SUTTON, *supra* note 10, at 194.

162. Aldisert, *supra* note 5, at 559.

suggests there is no important litigation except cases interpreting federal statutes or the federal constitution."[163] Out of approximately 200 accredited and unaccredited law schools in the United States, only twenty-eight taught a state constitutional law course in 2016.[164] The media constantly highlights state court shortcomings, which provides the American public with the impression that state courts are less legitimate than their federal counterparts.[165]

Thus, state court judges seek to derive legitimacy from citing to their federal counterparts that are more influential in scholarship and in the media.[166] State courts often inject federal authority into their decisions even though only state law is at issue.[167] By injecting federal law into a case, the state court gives the federal judiciary the potential jurisdiction to decide the claim, since the state court's holding is no longer predicated on an "adequate and independent" state ground.[168] State courts and state legislatures are happy to have federal court precedent resolve controversial policy issues to avoid making unpopular decisions.[169] Some argue that state judges abdicate their duty to solve these traditionally localized problems in a charged political climate.[170]

Ensuring legitimacy by citing federal precedent in state court opinions dealing with state law may also be spurred by the expansion of the federal government, national political parties, and national lobbies, which have created a "homogenizing influence on our political and cultural identity."[171] In today's society, most people see themselves first as American citizens and second as citizens of the states in which they reside.[172] Indeed, under the Citizenship Clause in the U.S. Constitution, a person cannot be a citizen of a state without also being a citizen of the United States.[173]

These perceptions of federal identity may also make it harder for state courts to confidently rely on their states' unique history, values, and character to justify nonconformity with the U.S. Constitution, especially in situations where the state and federal constitutional language are exactly the same.[174] When judges and citizens cannot distinguish a state's identity from the

163. *Id.*
164. SUTTON, *supra* note 10, at 194–95.
165. Aldisert, *supra* note 5, at 559.
166. *See* GARDNER, *supra* note 4, at 23–24.
167. Douglas, *supra* note 152, at 1143; *see also* MARKS & COOPER, *supra* note 6, at 42.
168. MARKS & COOPER, *supra* note 6, at 38. The Supreme Court formally stated this doctrine in *Murdock v. City of Memphis*, 87 U.S. 590 (1874). It was later revised in *Michigan v. Long*, where the Supreme Court developed the "plain statement rule," which presumes that when a state court relies on both federal and state law, the decision is based on federal law unless the opinion includes a clear statement to the contrary. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).
169. Aldisert, *supra* note 5, at 562.
170. *Id.*
171. Liu, *supra* note 137, at 1327.
172. *See id.*
173. U.S. CONST. amend. XIV, § 1.
174. *See* Liu, *supra* note 137, at 1328.

identity of the country as a whole, they may feel they lack a legitimate basis on which to diverge from federal interpretations of constitutional language.

The distinctiveness of state history, values, and character has significantly diminished from the time of the Framers. Understanding states as a unified community with common values can be seen as "silly" and "pointless," because state identity is a thing of the past.[175] What used to be fundamental principles consistent with the origins and evolutions of particular states are now understood as "transcendent American principles," and state courts treat them as such.[176]

3. State Courts Expect U.S. Supreme Court Justices to Be More Authoritative on Constitutional Issues

A third explanation for state court conformity to federal precedent is that state courts may presume the U.S. Supreme Court Justices are more authoritative on constitutional issues than they are.[177] This belief compels state court judges to view the Supreme Court's reasoning as presumptively correct. It is well known that the Supreme Court's main focus is constitutional jurisprudence.[178] The prevalence of constitutional interpretation in the Supreme Court's everyday institutional role may shape state court judges' perceptions that the Supreme Court has constitutional resources and expertise that make it more authoritative on any given constitutional interpretation issue. State courts' deferential language when conforming to Supreme Court precedent illustrates this state court presumption.[179]

Moreover, when state courts choose to depart from Supreme Court precedent, they still illustrate this presumption because state courts have a tendency to conform to the reasoning of a Supreme Court dissenting opinion when rejecting the majority opinion.[180] For example, after the Supreme Court ruled that prosecutors may always argue on summation that a defendant tailored testimony to the evidence presented at trial,[181] most state courts followed this holding.[182] However, even the handful of states that did not adopt this holding simply conformed to Justice Ginsburg's dissent in that case.[183] Of the states that interpreted their state constitutions differently than the Supreme Court interpreted the U.S. Constitution in *Agard*, only New

175. Schapiro, *supra* note 1, at 393.
176. Liu, *supra* note 137, at 1328.
177. *See id.* at 1314–15 (explaining that certain interpretive approaches treat federal precedent as presumptively correct).
178. *See* Aldisert, *supra* note 5, at 560.
179. *See supra* Part I.B.
180. *See supra* Part I.B.1. A different conclusion may be reached when examining a different subset of cases than those presented in this Note.
181. Portuondo v. Agard, 529 U.S. 61, 65 (2000).
182. *See supra* Part I.B.1.
183. *See supra* Part I.B.1. Massachusetts, Colorado, Hawaii, Minnesota, and New Jersey are the five states that have not conformed to the majority opinion.

Jersey did not explicitly conform to Justice Ginsburg's dissent.[184] The Hawaii Supreme Court cites Justice Ginsburg's dissent dozens of times in its decision regarding this prosecutorial summation issue.[185] The Hawaii Supreme Court praises the dissenting opinion for its apt observations and explicitly states its agreement with and adoption of the reasoning.[186] Thus, it seems that when the U.S. Supreme Court rules on a prosecutorial summation issue, the state courts narrow their reasoning to three options: the Supreme Court's majority, concurrence, or dissent. This adherence to some Supreme Court reasoning illustrates the perceived authority of the Supreme Court Justices' in the eyes of state court judges.

4. Uniformity Between Federal and State Law Promotes Efficiency

A fourth explanation for state court conformity to federal precedent is that state court judges value uniformity across state and federal jurisdictions, especially in the realm of criminal procedure.[187] "Vertical uniformity has been a particular concern in the area of criminal procedure, where courts have expressed concern about the costs and inefficiencies that disuniformity could impose on federal and state law enforcement officers."[188] Simplicity and predictability are often important considerations in the judicial decision-making process.[189]

Courts are worried about creating two sets of rules in criminal procedure, which could produce confusion among judges, lawyers, and law enforcement.[190] Although state courts explicitly weigh notions of federalism against uniformity, the value of uniformity appears to be more compelling in the criminal procedure context.[191] "Divergent interpretations are unsatisfactory . . . particularly where . . . the federal and state provisions are the same."[192] Additionally, this vertical uniformity has long been considered a jurisprudential virtue that prevents against forum shopping.[193]

As a practical matter, it is much easier for state courts to conform to federal court precedent than for federal courts to conform to various state court precedents. Once the U.S. Supreme Court promulgates an opinion, all federal

184. In *State v. Daniels*, the New Jersey Supreme Court cited Justice Ginsburg's dissenting opinion but did not follow its central tenant. State v. Daniels, 861 A.2d 808, 820 (N.J. 2004). Instead, the New Jersey Supreme Court held that prosecutors are never allowed to comment on a defendant's presence in the courtroom when making tailoring accusations. *Id.* at 819.

185. State v. Mattson, 226 P.3d 482, 493–98, 506, 508, 511–13 (Haw. 2010).

186. *See id.* at 495–96.

187. *See* Liu, *supra* note 137, at 1333.

188. *Id.*

189. *Id.* at 1334.

190. State v. Short, 851 N.W.2d 474, 516 (Iowa 2014) (Waterman, J., dissenting); *see also* McCrory v. State, 342 So. 2d 897, 900 (Miss. 1977) (en banc); State v. Florance, 527 P.2d 1202, 1209 (Or. 1974) (en banc); State v. Poole, 871 P.2d 531, 536 (Utah 1994) (Stewart, Associate C.J., concurring).

191. *See* State v. Hunt, 450 A.2d 952, 955 (N.J. 1982).

192. *Id.* (arguing for the application of uniform rules governing search and seizure issues).

193. Liu, *supra* note 137, at 1334.

courts across the country must follow this precedent.[194] However, when a state supreme court promulgates an opinion, it is only binding on the lower courts in its own state.[195] Therefore, it is much more convenient for all state courts to conform to one unified federal precedent than it is for the federal courts to pick one state holding to adhere to and wait for the U.S. Supreme Court's approval. The dual forces of efficiency and uniformity can explain state courts' tendencies to conform to federal precedent in the criminal procedure context.

B. Justifications for State Court Independence from Federal Precedent

Despite the clear patterns of state court behavior illustrated in Part I.B, there are many reasons why state courts should not readily conform to federal precedent. Many of these considerations directly undermine the theories and assumptions underlying the state court motivations outlined in Part II.A. State court behavior in relation to U.S. Supreme Court precedent would likely be different if state courts relied on competing considerations, including state-specific constitutional interpretative methods, legitimacy garnered from the inherent authority conferred on all state courts, state courts' overwhelming experience with criminal trial procedure, and the need for laws tailored to the specific concerns and culture of a jurisdiction.

1. Interpretive Methods Focusing on the State-Specific Context

The first justification for state court independence from federal precedent is that some state court judges analyze their constitutions using interpretive methods that emphasize state history and culture. Although some state courts may see their constitutions as derivatives of the U.S. Constitution, the language of the U.S. Constitution was at least partially derived from various state sources.[196] The Framers did not develop the concept of a modern, written constitution; instead, drafters of the former American colonies developed written constitutions eleven years before the Constitutional Convention.[197] Although this relationship may again suggest convergence, it could also suggest that the hierarchy should be flipped, in that the U.S. Supreme Court should be looking to the states as a superior source of constitutional interpretation, instead of the opposite.[198]

When the Committee of Detail[199] began to write the first draft of the U.S. Constitution in the summer of 1787, its members gathered materials they thought may have language from which they could borrow.[200] These

194. *See* U.S. CONST. art. III, § 1.
195. *See* MARKS & COOPER, *supra* note 6, at 144–48.
196. *See* GARDNER, *supra* note 4, at 23.
197. *Id.*
198. *See supra* Part II.A.1.
199. This committee consisted of five delegates of geographical diversity, political experience, drafting ability, and overall prestige, who were voted to this position by the common consent of the delegates to draft the new constitution of the United States. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 200–01 (1987).
200. *Id.* at 201.

materials included the Articles of Confederation, the Virginia and New Jersey Plans, and several state constitutions.[201] Additionally, when the federal Bill of Rights was added to the Constitution in 1791, most of its language was borrowed from existing state constitutions, particularly the Virginia Declaration of Rights.[202]

Dating as far back as 1641, the Massachusetts Body of Liberties provided for due process, jury trials, and double jeopardy protections.[203] In 1776, the Virginia Declaration of Rights provided, "a man hath a right to demand the cause and nature of his accusation, to be confronted by the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury."[204] The Sixth Amendment of the U.S. Constitution incorporates much of this language.[205] The Constitution of the Commonwealth of Massachusetts, one of the oldest governing constitutions in the world, established in 1780, provides language similar to the Fourteenth Amendment's Due Process Clause, stating, "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."[206]

Additionally, most state constitutions have either been amended or completely replaced in recent years, so their texts have different interpretive historical contexts than the U.S. Constitution, drafted in 1787.[207] Given the ease with which states can amend their constitutions, state constitutional language is often much longer and broader in scope than the U.S. Constitution.[208] Because different pieces of state constitutional text were drafted and added in nearly every period of American history, the interpretive methods relevant to the U.S. Constitution's historical context have no applicability to much of the state constitutional language drafted in very different periods of American history.[209]

The fact that the federal constitutional language was derived from the states should reinforce state courts' influence and authority when interpreting their own state constitutional language amidst federal precedent. The U.S. Supreme Court, which has often looked to state court reasoning when deciding certain criminal procedure issues, reinforces this idea.[210]

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201. *Id.*

202. GARDNER, *supra* note 4, at 23.

203. *See* MASS. BODY OF LIBERTIES of 1641, arts. 18, 29, 42.

204. VA. DECLARATION OF RIGHTS art. VIII (1776).

205. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

206. MASS. CONST. art. X; *cf.* U.S. CONST. amends. V, XIV (stating that neither state nor federal governments can deprive citizens of "life, liberty, or property, without due process of law").

207. GARDNER, *supra* note 4, at 26–27.

208. *Id.* at 27.

209. *Id.*

210. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*,

2. State Courts Derive Legitimacy from Their Inherent Authority

A second justification for state court independence from federal precedent is that state court authority is derived completely separately from federal court authority. Not only do state courts have nearly plenary power to interpret their state constitutions with limited oversight from federal courts,[211] they also have an inherent authority stemming from subconstitutional common-law doctrine.[212] State courts, like their federal counterparts, have inherent common-law authority to promulgate state rules of procedure, evidence, and substance.[213] The inherent power to enforce standards of procedure can be used broadly to achieve the interests of justice.[214] State court power is at its peak in state criminal trials.

In *Federalist No. 45*, James Madison explained that the powers of the states "extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[215] The state is the repository of all inherent power and can delegate that power to its various branches of government.[216] Most often, this inherent power to conclusively interpret a state's constitution is delegated to the court of last resort.[217] This power is completely separate from the U.S. Constitution's express grant of power to the Supreme Court for constitutional interpretation.[218] Therefore, there is no legal need under the American federalist system for state courts to derive any legitimacy from federal precedent.

However, there are several reasons that many state courts use their inherent power "sparingly."[219] Instead of making decisions grounded in state constitutions, inherent power allows courts to make decisions in the "spirit of the [state's] Constitution."[220] Therefore, reliance on inherent power often lacks the same legitimacy when invoked as an explicit justification for fashioning a judicial rule or remedy.[221] Regardless of whether a court explicitly invokes inherent authority, state courts can impose new rules based

63 TEX. L. REV. 1025, 1039–40 (1985); *see also* William J. Brennan Jr., *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 947 (1964).

211. GARDNER, *supra* note 4, at 10.

212. Bennet L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 44 (1994).

213. *Id.* at 57–59. Supervisory power is a variant of this inherent power state courts hold; however, most references to supervisory power occur at the federal court level. *Id.* at 42 n.4.

214. *See id.* at 44.

215. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

216. MARKS & COOPER, *supra* note 6, at 7.

217. *Id.* at 143.

218. *See* U.S. CONST. art. III, § 2.

219. Teoume-Lessane v. United States, 931 A.2d 478, 495 (D.C. 2007) (stating "[o]ur decisions have made plain that this court's supervisory authority is to be 'sparingly exercised' . . . and we have been given no sound reason to exercise it in this context" (quoting Watkins v. United States, 846 A.2d 293, 300 (D.C. 2004))).

220. Gershman, *supra* note 212, at 44 (quoting People v. De Bour, 352 N.E.2d 562, 567–68 (N.Y. 1976)).

221. *Id.*

on considerations of justice, fair dealing, and standards of decency.[222] These powers are firmly grounded in state courts' historic equitable powers and do not need legal bolstering by federal precedent.[223]

3. State Court Judges Have More Exposure to Criminal Trials

A third justification for state court independence from federal precedent in the state criminal procedure context is that state courts oversee the vast majority of criminal trials. Although some state court judges may perceive the Supreme Court as having superior knowledge of constitutional issues,[224] this is simply not the case regarding criminal trial procedure, including prosecutorial summation issues. The federal courts only process 3 percent of all felony prosecutions and under 1 percent of all misdemeanor prosecutions.[225] Since state courts process the vast majority of criminal trials, they are better positioned to assess issues with the process and the consequences of those issues. State courts are more exposed to criminal trial procedure, even though the Supreme Court may be more experienced in constitutional interpretation.[226]

Additionally, the Supreme Court has acknowledged state court expertise in several areas of the law by using state court reasoning to inform its decisions about federal constitutional interpretation.[227] An accumulation of state court holdings that deviate from federal precedent can spur the Supreme Court to reconsider that particular issue.[228] The Supreme Court has previously adopted state court analysis in six key areas: judicial review, substantive due process, freedom of speech and religion, eminent domain, the right to bear arms, and the rights of the accused.[229] With regard to criminal procedure specifically, the state courts have anticipated and influenced Supreme Court interpretations of the U.S. Constitution on the right to counsel, the right to appeal, and the exclusionary rule.[230] For example, in *Faretta v. California*,[231] the Supreme Court justified its holding that a defendant has a constitutional right to self-representation by citing to thirty-six state constitutions that explicitly provide for this right.[232] The Supreme Court also reasoned that many state courts had already expressed

222. *Id.* at 62.
223. *See* MARKS & COOPER, *supra* note 6, at 155.
224. *See supra* Part II.A.3.
225. Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 123–24 (1996).
226. *See* Aldisert, *supra* note 5, at 572.
227. *See* Utter, *supra* note 210, at 1030.
228. Liu, *supra* note 137, at 1332.
229. *See* Utter, *supra* note 210, at 1030.
230. *See id.* at 1039–40; *see also* Brennan Jr., *supra* note 210, at 947 (listing his own experiences on the New Jersey Supreme Court that had an influence on federal case law in the area of Fifth Amendment rights against self-incrimination and other rights of criminal suspects).
231. 422 U.S. 806 (1975).
232. *Id.* at 813–14, 813 n.10.

the view that the U.S. Constitution supports the right to self-representation in a criminal trial.[233] This shows that state courts have the expertise to decide issues of criminal trial procedure. State courts have made valuable contributions to federal constitutional law through their independent interpretations of state constitutions.[234]

4. The Value of Uniformity Is Outweighed by the Need for State-Specific Laws

A fourth justification for state court independence from federal precedent is the need for particularized rules tailored to a jurisdiction's specific demands and culture. The interest of federal-state uniformity may be one consideration in a court's analysis, but it should not be the deciding factor.[235] State courts have a duty to use their authority to oversee and shape state criminal trial procedures that protect individual rights.[236]

"[S]tate courts do not have to consider the national implications of their decisions. They need only reach the best decisions for their own communities."[237] Although it can be argued the specific cultures of states have eroded due to the rise of a stronger national government,[238] there are many state-specific considerations that should be contemplated when interpreting state constitutional language. For example, Alaskan "character" is based on values of independence, self-reliance, and individualism, and the framers of Alaska's constitution likely shared these values.[239] Thus, the Alaskan judiciary has interpreted certain state rights to be broader than their federal counterparts by emphasizing the value of liberty in Alaskan society as stronger than the value of liberty in American society generally.[240]

Another example of prevalent state-specific considerations is Georgia's focus on the central role of the family and the promotion of certain community moral standards through state law.[241] These standards are meant to protect Georgia's character in the broader American society and stem from its experience with federal control after the Civil War.[242] Finally, Vermont's history of pragmatism and republicanism and its heightened deference to local government may shape the state judiciary's interpretation of certain clauses of its constitution.[243]

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233. *Id.*
234. Utter, *supra* note 210, at 1026.
235. People v. P.J. Video, Inc., 501 N.E.2d 556, 561 (N.Y. 1986).
236. *See* Gershman, *supra* note 212, at 59 n.123.
237. Utter, *supra* note 210, at 1045.
238. Liu, *supra* note 137, at 1327.
239. JAMES T. MCHUGH, EX UNO PLURA: STATE CONSTITUTIONS AND THEIR POLITICAL CULTURES 37 (2003).
240. *Id.* at 42; *see also* Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972) (stating that "[t]he United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice").
241. MCHUGH, *supra* note 239, at 106.
242. *Id.*
243. *Id.* at 220.

State courts have a duty to weigh these local needs against the value of uniformity of state and federal case law. The very purpose of state court authority and state constitutional history is wasted when state courts blindly conform to federal precedent, especially in the highly localized area of criminal trial procedure.

III. STATE COURTS SHOULD NOT OVEREMPHASIZE U.S. SUPREME COURT PRECEDENT REGARDING PROSECUTORIAL SUMMATIONS

Despite the numerous, and often competing, considerations behind state court adherence to federal precedent illustrated in Part II, state courts should nevertheless only give U.S. Supreme Court decisions the same persuasive weight as those of sister state courts, especially in the realm of prosecutorial summation arguments. Ultimately, "each tribunal is supreme in its own field, and in the final analysis neither can do the other's job."[244]

State courts should not feel compelled to adhere to the U.S. Supreme Court's interpretation of the U.S. Constitution regarding prosecutorial summation issues for several reasons. First, state constitutional interpretative methods based on the presumption of federal superiority are inconsistent with the federalist structure the Framers intended. Second, state courts should ground their institutional legitimacy soundly in their own inherent powers and precedent instead of in Supreme Court precedent. Third, state courts have more exposure to and experience with criminal trials than federal courts, thus the perception that the Supreme Court is more authoritative in the realm of prosecutorial summation arguments is unfounded. Fourth, the values of uniformity and convergence of state and federal law are outweighed by the need for state-specific criminal trial procedure that is tailored to the needs of each jurisdiction for prosecutorial summation issues.

A. State Courts Should Emphasize State History and Context

To give state constitutional language its intended meaning, state courts must utilize state constitutional history and context when interpreting state constitutional provisions. Analyzing the historical context and the intentions of the framers of the state constitutions is the only way to give state constitutional language its true meaning and effect. When judges interpret the U.S. Constitution, they often look to the historical context and the Framers' intentions.[245] They use records from the Constitutional Convention and *The Federalist Papers* to interpret the federal constitutional language because the document is a product of the late eighteenth century.[246] Yet, when state judges interpret state constitutions, there is rarely any discussion

244. Brennan Jr., *supra* note 210, at 946.

245. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013) (defining the common constitutional interpretation method of originalism).

246. GARDNER, *supra* note 4, at 28.

of the drafters' intentions or the historical context in which the language was adopted.[247]

Using interpretive methods that take into account the state-specific context of the constitutional language is especially important for state constitutions because state constitutions are easier to amend and more specific than the U.S. Constitution.[248] Therefore, while most of the federal constitutional text embodies the ideas of one generation at a specific point in American history, many state constitutions reflect the intentions of various generations.[249] For example, many state constitutions contain language that directly addresses the prominent problem of government debt that arose in the mid-nineteenth century after states overspent on infrastructure in response to the Industrial Revolution.[250] These provisions should be interpreted differently than the provisions adopted by some states a century later, in response to the Great Depression, that provide for "aid, care and support of the needy."[251]

State courts that use the "criteria method" should pay particular attention to the state-specific context of their constitutional language. The criteria approach automatically frames federal precedent as presumptively correct.[252] Although the criteria method often explicitly contemplates "constitutional history" and "matters of particular state or local concern,"[253] the presumptive correctness of federal precedent remains problematic. The U.S. Supreme Court's holdings surely deserve respect, especially when they provide insights into the origins of federal constitutional language. However, the U.S. Supreme Court should not be presumed correct when its ruling is based "only [on] a contemporary 'balance' of pragmatic considerations about which reasonable people may differ over time and among the several states."[254]

This focus on state-specific interpretive methods is applicable even when the federal and state constitutional language is identical. State-specific concerns can result in different interpretations of constitutional formulations, such as "reasonableness," fairness, or directness in the context of prosecutorial summation rules.[255] State supreme court judges' views of these amorphous constitutional concepts within their own states' social and political contexts are just as valid as those of the U.S. Supreme Court Justices in the context of the federal government.[256]

The "'balance' of pragmatic considerations about which reasonable people may differ"[257] is especially prominent in the prosecutorial summation

247. *See* Liu, *supra* note 137, at 1328.
248. GARDNER, *supra* note 4, at 26–27.
249. *Id.* at 27.
250. *Id.* at 28.
251. *See, e.g.*, N.Y. CONST. art. XVII, § 1.
252. *See supra* notes 144–51 and accompanying text.
253. State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (en banc).
254. State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983).
255. *See* WILLIAMS, *supra* note 7, at 170.
256. *Id.*
257. *Kennedy*, 666 P.2d at 1321.

context. The rules of prosecutorial summations often involve weighing the protections of the accused against the need for the prosecutor to argue and inquire about aspects of the defendant's case.[258] The balance that must be struck between both parties should involve a state-specific analysis because the vague constitutional constructs at the core of criminal trial procedure may be interpreted differently based on reasonable interpretations of constitutional language and constitutional contexts. This is especially true since the Supreme Court often calls on state courts to afford different rights to their citizens on state law grounds with respect to criminal trial procedure.[259] State court judges should use state-specific constitutional interpretation methods to give each state's constitution its full intended meaning, especially when analyzing prosecutorial summation issues.

B. State Court Legitimacy Through Broad Inherent Authority

"[S]tate governments possess all inherent power necessary to govern."[260] This is especially true in the prosecutorial summation context, where state courts have the authority to promulgate rules of procedure, evidence, and substance.[261] This authority should not be wasted by simply adhering to Supreme Court precedent. It should be used broadly to achieve the interests of justice in accordance with the needs and customs of a specific jurisdiction.[262]

Legitimacy is an urgent concern for state judges, especially since many face reelection.[263] It is true that the media and academia focus on and glorify the federal judiciary, while underrepresenting the state judiciary and emphasizing its shortcomings.[264] However, if the state judiciary continues to derive its legitimacy by relying on the federal judiciary, it will never gain the legitimacy it legally possesses in its own right.[265] State judges' reliance on federal precedent further reinforces the supremacy of the federal judiciary in the eyes of the public. State court judges who rely on federal court precedent reinforce the idea that the federal courts somehow control state court analysis and reasoning. This is simply not the case in the realm of state constitutional jurisprudence, especially for rulings related to prosecutorial summation issues.

Even if state courts feel compelled to rely on other precedent or interpretation to bolster their own reasoning, it would make more sense for them to rely on sister state court cases than federal precedent.[266] Sister state courts will have similar exposure to prosecutorial summation issues and are

258. *See* United States v. Hasting, 461 U.S. 499, 506–07 (1983).
259. *See* WILLIAMS, *supra* note 7, at 181; *see also* Portuondo v. Agard, 529 U.S. 61, 76 (2000) (Stevens, J., concurring).
260. MARKS & COOPER, *supra* note 6, at 1.
261. *See* Gershman, *supra* note 212, at 57–59.
262. *See id.* at 44.
263. *See* MARKS & COOPER, *supra* note 6, at 180–81.
264. Aldisert, *supra* note 5, at 559.
265. *See* MARKS & COOPER, *supra* note 6, at 1.
266. *See* SUTTON, *supra* note 10, at 175.

more likely to share linguistic and historical roots than the U.S. Constitution.[267] Additionally, these state courts consider a similar geographic area, as opposed to the Supreme Court, which considers constitutional interpretation on a national level.[268] This interstate reliance on sister state courts would also bolster state court legitimacy, since relying on each other's authority would reinforce the integrity and validity of the state judiciary as a whole.

State court judges specifically have the power to create local rules and practice guides prioritizing or informing the legal community about state law claims.[269] The Oregon State Bar has already promulgated a state constitutional law practice guide that two state court judges and three practitioners wrote.[270] Similar initiatives can help members of the bar realize the independent role state constitutional law can play in representing their clients.[271] This prioritization could help to create a more robust state constitutional law jurisprudence, which would help the state judiciary garner more attention in academia and the media, thus bolstering its legitimacy in the eyes of the public.

The structure of the American federalist system was specifically designed so that state courts may enjoy some degree of independence from the federal judiciary.[272] Although there is some debate as to whether states should be seen as independent "laborator[ies]"[273] or as "part of the same general research institution,"[274] the concept of some level of independence is maintained. The Framers would not have made such an effort to delineate the powers of the state and federal governments if they were not meant to be separate institutions. The foundational organization of the American judiciary reinforces state courts' legitimacy through their inherent authority.

C. State Court Exposure to Prosecutorial Summations

Prosecutorial summation speeches are overwhelmingly an aspect of criminal trial procedure specific to state trial courts.[275] Yet, it is evident from state court language that state judges presume the Supreme Court Justices are more authoritative on constitutional interpretation regarding prosecutorial summation issues than state court judges are.[276] Although the Supreme Court's main focus is constitutional jurisprudence,[277] state courts are better

267. *Id.*
268. *Id.*
269. *See id.* at 192 (explaining that state court judges, state legislatures, advocates, clerks' offices, and professors create state rules of civil and appellate procedure).
270. *See id.* at 193.
271. *Id.*
272. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").
273. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
274. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 343 (2011).
275. Latzer, *supra* note 225, at 123–24.
276. *See supra* Part I.B.
277. *See* Aldisert, *supra* note 5, at 560.

equipped to interpret their constitutional language in the context of prosecutorial summation issues.

Based on the sheer volume of criminal cases, the state courts are better equipped to evaluate the various considerations at play in prosecutorial summation issues. The state courts handle approximately 97 percent of all felony cases and approximately 99 percent of all misdemeanor cases.[278] This means that state court judges are significantly more exposed to the effects of their rulings and the policies that they impose. This exposure makes for more informed policy that is tailored to a jurisdiction's specific needs based on state court judges' everyday experience in the courtroom. Although the U.S. Supreme Court Justices may have more experience in interpreting open-ended constitutional language such as "reasonableness," state courts have more experience with the actual procedure in which the interpretation of constitutional language concerning prosecutorial summation issues must be grounded.[279] When state judges blindly apply federal precedent to state law prosecutorial summation issues, they are eschewing the wealth of knowledge amassed through their extensive criminal trial procedure experience. Furthermore, the underlying reasoning behind federal court precedent may be totally at odds with the various policy considerations at play in state court prosecutorial summation issues.

The Supreme Court itself has acknowledged the superiority of state court experience with criminal trial procedure in the past by quoting state court cases in justifying its own constitutional interpretations.[280] The Supreme Court has also changed its own ruling when an accumulation of state court constitutional interpretations departed from the federal precedent.[281] This shows that state court judges should view the interaction between the state and federal judiciaries as a dialogue instead of a monologue of marching orders that the U.S. Supreme Court dictates to the states.[282] This dialogue is especially important in the prosecutorial summation context where state courts have more exposure to the subject matter than federal courts. Silencing this dialogue is detrimental to the development of both state and federal constitutional interpretation.

D. The Need for State-Specific Criminal Trial Procedure

Judicial efficiency through legal uniformity is an important consideration in the criminal procedure context for many judges in the American judiciary.[283] However, federal-state uniformity should not be an influential factor in the prosecutorial summation context for several reasons.

278. Latzer, *supra* note 225, at 123–24.

279. On the Supreme Court, as of November 2020, only Justice Alito and Justice Sotomayor have any experience as trial court lawyers, both having served as prosecutors for a handful of years. *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/KFE9-N6PF] (last visited Nov. 3, 2020).

280. *See, e.g.*, Faretta v. California, 422 U.S. 806, 813–14 (1975).

281. *See* Liu, *supra* note 137, at 1332.

282. *See id.* at 1333.

283. *Id.*

First, prosecutors are only required to adhere to the rules of the jurisdiction to which they are assigned to practice.[284] Thus, the idea that disuniformity would create inefficiencies between federal and state authorities does not apply to the prosecutorial summation context.[285] A prosecutor will be appearing in either state or federal court, never both. This gives state courts all the more license to tailor prosecutorial summation rules specifically to their particular jurisdictions' needs and culture because prosecutors will not be concerned about other jurisdictions' rules in their everyday practices. There will be no confusion about which rules apply to federal and state law enforcement officers, as may be the case in other areas of criminal trial procedure.[286]

Second, although there is some question about the extent to which states have different cultures and concerns in an era of emphasis on national citizenship and culture,[287] there is a need for particularized criminal trial procedure based on the unique customs and challenges that apply to certain states and jurisdictions. The unique cultural aspects of liberal states like Alaska or conservative states like Georgia should have judiciaries that interpret their state constitutions in the context of those cultures.[288]

Liberal versus conservative considerations are not the only distinctions to be made among state cultures. Hawaii's multiethnic heritage,[289] Louisiana's constitutional patriarchy,[290] and Wyoming's communitarian ideals[291] all should influence the way state court judges analyze and construct different prosecutorial summation rules. Although not all states will have such starkly differing cultures, at the very least, different regions of the country have different historical foundations, requiring state courts to prioritize specialized rules over uniformity. To ignore the cultural ethos of a state in the context of prosecutorial summation issues is to ignore the differing values and historical foundations that shaped the creation of each state's constitution. Unlike other areas of criminal procedure that may involve the interaction between federal and state officials, there is no such justification in the prosecutorial summation context.

CONCLUSION

State courts should refrain from allowing the Supreme Court to loom large in prosecutorial summation jurisprudence when state courts are better equipped to make decisions on these issues. State court judges should utilize state-specific constitutional interpretation methods when interpreting state

284. *See* Newman F. Baker & Earl H. De Long, *The Prosecuting Attorney—Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L. & CRIMINOLOGY 1025, 1027 (1934).

285. *See* State v. Hunt, 450 A.2d 952, 955 (N.J. 1982) (arguing for uniform rules in the criminal procedure context).

286. Liu, *supra* note 137, at 1333–34.

287. *See id.* at 1327.

288. *See supra* Part II.B.4.

289. MCHUGH, *supra* note 239, at 107–34.

290. *Id.* at 135–60.

291. *Id.* at 221–48.

constitutions, instead of relying on constitutional interpretation methods that begin by presuming federal constitutional interpretations are applicable and correct. State courts possess the inherent authority to rule independently on state criminal trial procedure and needlessly relying on federal precedent only undermines their legitimacy. Logistically, state courts have significantly more exposure to criminal trial procedure because they handle the vast majority of criminal cases. Although convergence and uniformity between federal and state rules may be justified for other criminal trial procedure topics, here, in the context of prosecutorial summations, there is no reason for state courts to adhere to federal precedent. U.S. Supreme Court precedent can be used as instructive reasoning for state court judges, but its influence should not be heightened any further.