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Terminating the Guardianship: A New Role For State Courts.

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ST. MARY'S LAW JOURNAL

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TERMINATING THE GUARDIANSHIP: A NEW ROLE FOR STATE COURTS

M.P. DUNCAN III*

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**I've seed de first en de last . . . I seed de beginnin, en now I sees de endin.*

I. INTRODUCTION

A. *Recent Focus on Civil and Political Rights*

Beginning in 1961, the United States Supreme Court, principally through the persuasive leadership of Chief Justice Earl Warren,[1] commenced a didactical excursion that would leave as its memento a series of decisions that will alter forever our perception of an individual's civil and political rights. The vehicle employed to make this journey was the fourteenth amendment to the United States Constitution.[2] According to Justice William Brennan, *Brown v. Board of Education*[3] and *Baker v. Carr*[4] were unquestionably significant milestones in society's efforts to achieve equality, but "even more significant for the preservation and furtherance of the ideals we have fashioned for our society were the decisions binding the states to almost all of the restraints in the Bill of Rights."[5] Through decisions such as *Mapp v. Ohio*,[6] *Robinson v. California*,[7] *Gideon v. Wain-*

* FAULKNER, THE SOUND AND THE FURY 371 (Random House 1956).

1. President Dwight D. Eisenhower appointed Earl Warren Chief Justice of the United States Supreme Court following the death of Chief Justice Fred M. Vinson in 1953. Warren took the prescribed judicial oaths on the opening day of the October 1953 Term (October 5, 1953). B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY 23 (1983). Commentators have described the Warren Court's decisions pertaining to civil rights, freedom of the press, freedom of speech, and criminal procedure as a constitutional revolution. *See* Lewis, *Foreward* to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T at vii (V. Blasi ed. 1983). Acknowledging Chief Justice Warren's seemingly instinctive leadership abilities, Justice William Brennan often referred to him as "Super Chief," and this appellation was quickly adopted by other members of the Court. B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 31, 771 (1983). Chief Justice Warren retired on the last day of the October 1968 Term (June 23, 1969). *Id.* at 764.

2. The fourteenth amendment states in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

3. 347 U.S. 483, 495 (1954)("separate but equal" doctrine inappropriate for public education system because separate facilities inherently unequal).

4. 369 U.S. 186, 209-10 (1962)(because equal protection clause shelters political rights, failure to reapportion legislature to comport with growth and redistribution of population discriminatory).

5. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536 (1986).

6. 367 U.S. 643, 654-55 (1961)(fourth amendment's search and seizure prohibition applicable to states through fourteenth amendment).

wright,[8] *Malloy v. Hogan*,[9] *Miranda v. Arizona*,[10] *Pointer v. Texas*,[11] and *Benton v. Maryland*,[12] the Supreme Court transformed an almost dormant provision of the Constitution[13] into a vibrant "guarantee of individual liberties equal to or more important than the original Bill of Rights."[14] Particularly between 1961 and 1969, the Warren Court converted a nation replete with "racism, political rotten boroughs, McCarthyism, discriminations against the poor, puritanism in sexual matters, denial of the suffrage, and egregious infringements on the rights of the criminally accused"[15] into one that fervently values individual liberty and equal opportunity. The fourteenth amendment appropriately became known as " 'our second Bill of Rights.' "[16]

For too many years, however, the public's perception has been that "[i]f rights are not protected in Washington, D.C., then . . . [the public] do[es] not expect them to be honored in Helena, Montana . . . .":[17] "Until a constitutional question is resolved by the United States Supreme Court it remains a question."[18] That perception is finally dissipating. There is an emerging trend for state appellate courts to

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7. 370 U.S. 660, 666-67 (1962)(state statute making narcotic addiction criminal offense punishable by imprisonment violative of cruel and unusual punishment prohibition of eighth and fourteenth amendments).

8. 372 U.S. 335, 342-43 (1963)(fourteenth amendment obligates states to ensure sixth amendment guarantee of counsel for accused in criminal prosecution).

9. 378 U.S. 1, 8 (1964)(fourteenth amendment prohibits state infringement of fifth amendment's privilege against self-incrimination).

10. 384 U.S. 436, 464, 467 (1966)(fifth amendment compels adequate and effective explanation of accused's rights prior to custodial interrogation, and privilege fully applies to both federal and state proceedings).

11. 380 U.S. 400, 403 (1965)(fourteenth amendment requires states to guarantee defendant's sixth amendment right to confront witnesses against him).

12. 395 U.S. 784, 794-95 (1969)(fifth amendment's double jeopardy prohibition fundamental to scheme of justice and applicable to states through fourteenth amendment).

13. *See* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536-37 (1986)(describing changes in perceived need or lack of need for protection against state's abuse of power).

14. *Id.* at 545.

15. L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 221 (1986).

16. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546 (1986)(quoting R. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 301 (1981)).

17. Collins, *Reliance on State Constitutions: Some Random Thoughts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 1, 5 (B. McGraw ed. 1985)(state law not taken seriously).

18. *Id.* (state judiciary neglected opportunity to create "final and logically sustaining body of legal standards"). The last time a major treatise on constitutional law discussed state

flex their authoritative muscles and, instead of mimicking United States Supreme Court thought, to resolve issues, including questions of civil and political rights, on applicable state constitutional grounds. This is the "new federalism."[19]

This article will review the role played by the states in the development of the federal Bill of Rights, the states' subsequent failure to rely on their own constitutional provisions in protecting individual rights and liberties, and the United States Supreme Court's "conservative activism" as the impetus for recent assertions of state court authority. Examples of state court reliance on state constitutional provisions in criminal prosecutions and in a first amendment context will be presented. The article will then examine the Supreme Court's attempt to define "adequate and independent state grounds," as well as the Court's decision in *Michigan v. Long*. Following are factors that state courts may consider and discuss in decisions premised on state law. Finally, this article will describe reactions to the new federalism by the voting public, by practicing attorneys, and by state courts hearing cases on remand from the United States Supreme Court.

B. *Role of States in Development of Federal Bill of Rights*

The genesis of bills of rights was the American revolutionary philosophical principle that an individual's rights and liberties are actually natural rights that are "possessed by individuals in the state of nature."[20] These natural rights to be "equally free and independent"[21] are so inherent to one's existence that they are not depleted when individuals "enter into a state of society."[22] In addition to the rights possessed in a state of nature, organized society must create artificial

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bills of rights was over sixty years ago. *Id.* (citing T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (8th ed. 1927)).

19. The term "new federalism" appears to have been coined by Professor Donald E. Wilkes, Jr., of the University of Georgia School of Law. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 426 (1974)(state-based rights assume increasing significance during nation's new period of federalism). Enthusiasm for decisions based on state law has not been uniform. *See, e.g.*, People v. Norman, 538 P.2d 237, 245-46 n.1 (Cal. 1975)(Clark, J., dissenting)(majority's reliance on state constitution "excessive bicentennial spirit").

20. L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 107 (1986).

21. *Id.* (quoting VA. CONST. art. I, § 1 (Virginia's declaration of rights)).

22. *Id.* (quoting VA. CONST. art. I, § 1 (Virginia's declaration of rights)).

derivative rights in order to protect natural rights.[23] For example, the right to a jury trial is not a natural right, but a right demanded by society to protect the natural rights of life, liberty, and property.

Following the Revolutionary War, all of the original states except Connecticut and Rhode Island,[24] stimulated by the social contract theory[25] and the idea that government existed for the benefit of the people,[26] took immediate steps to develop written constitutions.[27] The word "constitution," however, meant something new: to the new Americans, the word "signified . . . a supreme law creating government, limiting it, unalterable by it, and paramount to it."[28] Virginia produced the first permanent constitution containing a rather comprehensive list of individual rights and liberties that were protected from governmental intrusion.[29] Pennsylvania's bill of rights was even more comprehensive.[30] Progressively, the succeeding state constitutions secured rights and liberties that their predecessors did not secure. Massachusetts, the last of the original states to adopt a constitution (in 1780), was also the first state to create a constitution through a constitutional convention and to have it submitted to the public for ratification.[31] Understandably, the Massachusetts bill of

23. *See id.* (government is voluntary contract made to secure rights).

24. *See* W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTION IN THE REVOLUTIONARY ERA 6 (1980)(Connecticut and Rhode Island relied on existing charters until middle of nineteenth century).

25. *See id.* at 144-47 (under social contract theory, individuals relinquish alienable rights as consideration for sovereign's protection of person and property).

26. *See* The Declaration of Independence para. 2 (U.S. 1776)(government organized to ensure safety and happiness of those governed).

27. *See generally* W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 4-6 (1980)(discussing drafting and adoption of state constitutions in Revolutionary era).

28. L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 129 (1986).

29. *See* 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 34-35 (1974)(significant that Virginia's constitutional convention resolved, first, to prepare declaration of rights and, second, to establish plans of government). For an in-depth analysis of the history, influence, and provisions of Virginia's Bill of Rights, see generally *id.* at 27-313.

30. *See* W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 79, 194 (1980)(Pennsylvania's constitutional drafting committee proposed radical limitation on private property ownership).

31. *See generally id.* at 5, 86-93 (discussing unprecedented opportunity for all adult male citizens to vote on constitutional draft).

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rights was the most comprehensive.[32]

As originally ratified, however, the United States Constitution did not contain a bill of rights.[33] Although prefacing the Constitution with a bill of rights had been suggested, the framers of the Constitution observed that securing rights of the people was unnecessary because the Constitution did not abrogate state bills of rights.[34] Moreover, the Constitution permitted the federal government to exercise only the powers enumerated therein, and all powers not expressly granted were reserved to the states.[35] Only because of the Anti-Federalists' activities and the insistence of James Madison was the Bill of Rights added to the Constitution.[36] James Madison even "conceded that the Constitution would have been defeated without a pledge from its supporters to back subsequent amendments."[37]

The irony of the trend toward the new federalism, then, is that the sources of liberty so long neglected — state constitutions — were to a great extent the bases upon which the federal Bill of Rights was founded. Although none of the states' bills of rights was complete enough to serve as the federal Bill of Rights, collectively they served as the basis upon which the first ten amendments to the United States Constitution evolved.

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32. *See id.* at 182-85 (several Massachusetts towns demanded right to vote for all taxpaying citizens, including Blacks, Indians, and mulattoes).

33. *See* L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 105 (1986)(constitutional convention deliberately omitted bill of rights).

34. *See id.* at 105-06.

35. *See id.* at 110.

36. A major political struggle among the thirteen colonies concerned the balance of power between the states and federal governments. Generally, the Federalists contended that a powerful national government would best secure the freedom and welfare of individuals. *See* G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 255 (1960). Because Anti-Federalist loyalty belonged primarily to states' rights, the Anti-Federalists were generally against a constitution that inadequately protected the states. *See* 1 THE COMPLETE ANTI-FEDERALIST: WHAT THE ANTI-FEDERALISTS WERE FOR 5 (H. Storing ed. 1981). The Federalists "grudgingly" agreed to add to the Constitution at a later date a comprehensive bill of rights, modeled after the state bills of rights, to avoid the defeat of the proposed Constitution. *See* L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 117 (1986). James Madison, a Federalist, found it politically expedient to switch positions and support a bill of rights. *See generally id.* at 117-22 (describing Madison's consideration of and influence on the Bill of Rights).

37. L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 117 (1986).

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C. *Failure of State Courts to Rely on State Constitutions*

Notwithstanding the prominent role that state constitutional guarantees of liberty played in the development of the federal Bill of Rights, state courts, with amazingly few exceptions, historically have failed to examine those state guarantees when confronting competing issues of governmental conduct and that conduct's relationship to individual rights. Instead, state courts have consistently deferred to the United States Supreme Court in confronting issues that involved individual rights that are guaranteed in both state and federal constitutions. The inferior role played by state courts during the Warren era was a combination of their disinclination to accept a leadership role in protecting civil liberties and their inclination to be passive when confronting so commanding a presence as the Supreme Court under Chief Justice Warren.[38] Regardless of the factors contributing to this passivity, one cannot escape the conclusion that the state courts neglected their responsibilities. However, state courts were then confronted with what may be called "conservative activism."

D. *Conservative Activism of the United States Supreme Court*

Following nearly a decade of championing individual rights and liberties and following the retirement of Chief Justice Warren, the United States Supreme Court slowly but inexorably began moving in the opposite direction. In what must be one of the most prevalent historical ironies ever, the only United States President to resign from office nominated Chief Justice Warren's successor, Warren Burger,[39] and the trend toward curtailing individual rights began. With Chief Justice Burger's retirement,[40] Justice Rehnquist's elevation to Chief

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38. It is so much easier to mimic than to create; it is so much easier to duplicate than originate.

39. President Richard M. Nixon appointed Warren E. Burger Chief Justice of the United States Supreme Court. Burger took the oath of office on June 23, 1969. B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY 764-65 (1983). In addition to Chief Justice Burger, President Nixon appointed Justices Harry Blackmun (1970), Lewis Powell (1971), and William Rehnquist (1971) to the high court. *Reagan's Mr. Right: Rehnquist Is Picked for the Court's Top Job*, TIME, June 30, 1986, at 24, 24-25 & n.*.

40. *See Reagan's Mr. Right: Rehnquist Is Picked for the Court's Top Job*, TIME, June 30, 1986, at 24, 25 (Chief Justice Burger advised President Reagan of decision to resign in May, 1986). After seventeen years as Chief Justice of the United States Supreme Court, Warren Burger resigned, ostensibly to devote more time to his duties as chairman of the Commission on the Bicentennial of the United States Constitution. *See id.* at 24-25. Although Chief Justice

Justice,[41] and the intent of the Reagan administration to mold the Court to comport with its conservative ideals,[42] this trend will continue and in all probability escalate. If the Warren era can legitimately be called the "criminal procedure revolution" of the 1960's,[43] then we are now in the midst of a counter-revolution.[44]

Professor Donald Wilkes has observed that the United States Supreme Court's proclivity for endorsing governmental authority when it conflicts with individual rights can be classified as follows:

1. The selective incorporation doctrine of the Bill of Rights has been less strenuously invoked.[45] For example, in *Apodaca v. Oregon*,[46] the Supreme Court concluded that the sixth and fourteenth amendments do not mandate unanimous jury verdicts in criminal prosecutions.[47]

2. A state criminal defendant's federally guaranteed rights have been significantly curtailed.[48] The most evident example of this is *United States v. Leon*.[49] In *Leon*, the Supreme Court rejected the long existing rule that a valid search warrant had to be supported by prob-

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Burger's resignation came one year earlier than many observers expected, the Reagan administration recognized that the timing was "politically opportune." *See id.* at 25-26.

41. *See generally id.* at 26 (describing President Reagan's process of appointing Chief Justice Rehnquist).

42. *See id.* at 25 ("Reagan has made it clear that he wants to remake the federal judiciary in his own conservative image."). "[V]acancies on the high court . . . offer Reagan a back-door means of achieving the New Right social agenda — including permitting prayer in schools and banning abortion — that elected politicians in Congress have so far rebuffed." *Id.*

43. *See* Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 168 (B. McGraw ed. 1986).

44. *Id. But see* Lewis, *Foreward* to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T at vii (V. Blasi ed. 1983)("there has been nothing like a counter-revolution").

45. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 168 (B. McGraw ed. 1985). For a discussion of the doctrine of selective incorporation, see generally H. CHASE & C. DUCAT, EDWARD S. CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 476-78 (14th ed. 1978).

46. 406 U.S. 404 (1972).

47. *See id.* at 410 (regarding commonsense judgment of laymen not tantamount to requiring unanimity).

48. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 168 (B. McGraw ed. 1985).

49. 468 U.S. 897 (1984).

able cause.[50] The Court concluded that the products of a search made pursuant to a warrant which is not supported by probable cause need not necessarily be suppressed if the police officer's conduct was in "reasonable" reliance on the warrant.[51] Justice Stevens, joined by three other justices, dissented and condemned the majority opinion as the product of "constitutional amnesia,"[52] asserting that the Bill of Rights was being converted "into an unenforced honor code that the police may follow in their discretion."[53]

Prior to *Leon*, an equally good example of the Supreme Court's retreat from being the "keeper of the nation's conscience"[54] was *Illinois v. Gates*.[55] This extremely controversial decision replaced the two-prong standard of determining probable cause[56] with the "totality of circumstances" test.[57]

3. The harmless error doctrine has been used more commonly to sustain convictions, even if constitutional violations are present.[58] In a nearly unbroken line of cases, the Supreme Court has concluded that even if constitutional violations are present, the error may be

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50. *See id.* at 918-21 (excluding evidence based on faulty warrant does not deter police misconduct).

51. *See id.* at 922 (officer's reliance on warrant's technical sufficiency must be "objectively reasonable").

52. *Id.* at 972 & n.27 (Stevens, J., dissenting)(fourth amendment intended to safeguard against warrant abuses, not merely require documentation).

53. *Id.* at 978 (Constitution requires remedy for fourth amendment violation).

54. "Keeper of the nation's conscience" is an appellation used to describe the United States Court of Claims as a guardian of the United States government's moral obligations. *See e.g.*, Menominee Tribe of Indians, 388 F.2d 998, 1012 (Ct. Cl. 1967) (Durfee, J., dissenting)(where majority found federal government not liable for state court decision abrogating Indians' hunting and fishing rights on reservation, dissent noted court had abandoned duties as 'keeper of the nation's conscience')(quoting unspecified Congressional committee); Pulaski Cab Co. v. United States, 157 F. Supp. 955, 958 (Ct. Cl. 1958)(Whitaker, J., concurring)(as 'keeper of the nation's conscience,' court obligated to compel sovereign to redress injuries caused by breaches of contract)(quoting unnamed "eminent lawyer").

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

56. *See* Aguilar v. Texas, 378 U.S. 108, 114 (1964)(in determining probable cause, magistrate must know some circumstances indicating (1) informant's basis of knowledge and (2) informant's credibility); *see also* Spinelli v. United States, 393 U.S. 410, 415-16 (1969)(in applying *Aguilar*'s two-part test, basis of knowledge must be more than casual rumor).

57. *See* Illinois v. Gates, 462 U.S. 213, 234 (1983)(because two-part test encourages "excessively technical dissection" of informant's description, magistrate should use totality-of-circumstances approach balancing relative weights of multiple indicia of reliability).

58. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 168 (B. McGraw ed. 1985).

harmless. In *Delaware v. Van Arsdall*,[59] for example, the Supreme Court concluded that the action of the trial court which restricted the defendant's right to cross-examine a witness about bias was a violation of his sixth amendment right of confrontation.[60] However, the trial court's ruling was subject to a harmless error analysis.[61] Recently, in *Rose v. Clark*,[62] the Supreme Court acknowledged that a state court jury instruction which impermissibly shifted the burden of proof of the mental element of a crime was a violation of due process as recognized in *Sandstrom v. Montana*.[63] However, such an instruction was also subject to the harmless error rule.[64]

4. Post-conviction recourse for state convicted defendants has become more restrictive.[65] Dominating the ever-increasing list of cases that are restricting federal post-conviction review is *Stone v. Powell*.[66] In that case, the Court concluded that 28 U.S.C. § 2254[67] does not authorize federal post-conviction review of claimed fourth amendment violations if the state provided the opportunity for a fair and complete litigation of the claim.[68] Similarly, in *Allen v. McCurry*,[69] the Court held that a 42 U.S.C. § 1983[70] plaintiff, whose lawsuit was based on a fourth amendment violation, cannot relitigate the issue if

59. 475 U.S. 673 (1986).

60. *See id.* at 679 (court did not permit cross-examination of State's agreement to dismiss unrelated criminal charge in exchange for witness's testimony).

61. *Id.* at 684 (describing factors to consider in determining whether error harmless beyond reasonable doubt).

62. __ U.S. __, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

63. *See id.* at __, 106 S. Ct. at 3107, 92 L. Ed. 2d at 472 (because prosecution must prove all elements of crime to obtain conviction, presuming malice may shift burden of proof of intent)(citing Sandstrom v. Montana, 442 U.S. 510, 523-24 (1979)).

64. *Id.* at __, 106 S. Ct. at 3109, 92 L. Ed. 2d at 474 (*Sandstrom*-type error must be established beyond reasonable doubt to reverse conviction)(citing Chapman v. California, 386 U.S. 18, 24 (1967)).

65. Wilkes, *The New Federalism in Criminal Procedure 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 168 (B. McGraw ed. 1985).

66. 428 U.S. 465 (1976).

67. 28 U.S.C. § 2254 (1982). The federal habeas corpus statute provides that a federal court may hear an application for relief where a defendant contends that he is being detained in violation of federal law and that he has either exhausted available state court remedies or that state court procedures are not adequate. *See id.*

68. *See* Stone v. Powell, 428 U.S. 465, 486 (1976).

69. 449 U.S. 90 (1980).

70. 42 U.S.C. § 1983 (1982). The federal civil rights statute authorizes a private cause of action against persons who have deprived persons within the jurisdiction of the United States of federal rights, privileges, or immunities under color of law. *See id.*

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the state court adequately considered the fourth amendment question in making an adverse decision.[71]

Procedurally, according to *Rose v. Lundy*,[72] a state prisoner's application for a writ of habeas corpus must be dismissed if the application contains any issues that were not exhausted in the state court, even though it contains issues that have been exhausted.[73] Moreover, in *Pulley v. Harris*,[74] the Court held that federal habeas corpus relief cannot be obtained to correct an error of state law unless the error was so egregious as to deny the defendant due process or equal protection.[75]

5. The use of illegally seized evidence for impeachment has been authorized.[76] In 1971, the Court in *Harris v. New York*[77] held that a confession given without the *Miranda* warnings may nonetheless be used for impeachment if the confession was otherwise voluntary and the defendant's direct testimony is inconsistent.[78] In *Oregon v. Hass*,[79] the rule in *Harris* was expanded to the situation where a statement was made after the warning but before the defendant was permitted to speak with a requested lawyer.[80] Most recently, in *United States v. Havens*,[81] the Court held that illegally obtained evidence could be used to impeach a defendant's response to cross-examination if the questions asked during cross-examination were reasonably within the scope of questions asked during direct examination of the defendant.[82]

Confronted with the advent of what one can label the seemingly contradictory "conservative activism," state courts in many cases

71. Allen v. McCurry, 449 U.S. 90, 103-04 (1980)(no legislative intent in 42 U.S.C. § 1983 to void state-court judgment where state court provides fair and full opportunity to protect federal rights).

72. 455 U.S. 509 (1982).

73. *Id.* at 522.

74. 465 U.S. 37 (1984).

75. *See id.* at 41.

76. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 168 (B. McGraw ed. 1985).

77. 401 U.S. 222 (1971).

78. *See id.* at 225 (possibility of deterring police misconduct by excluding evidence of defendant's credibility speculative).

79. 420 U.S. 714 (1975).

80. *See id.* at 722 (*Miranda* not license for perjury); *see also id.* at 723 (excluding testimony for impeachment purposes would pervert constitutional protection against self-incrimination).

81. 446 U.S. 620 (1980).

82. *See id.* at 627.

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have started rejecting Supreme Court analysis and have provided to individuals greater liberties and rights under the various states' constitutions than were accorded under the federal constitution.[83] Thus, state courts and their relationship to the Supreme Court have undergone and are presently experiencing an emerging sense of proportionality. In this instance irony is again evident: the conservative notion of opposing a dominant federal authority has given rise to states interpreting their own laws. To the chagrin of many conservative theorists, this interpretation is far more oriented toward individual rights and liberties than was anticipated.

II. Evolving Role of State Courts

A. *Authority for State Court Departure from Supreme Court Decisions*

The principal of law utilized by state courts to depart from United States Supreme Court authority is quite old. In *Murdock v. City of Memphis*,[84] the Supreme Court, reviewing its constitutional and statutory jurisdiction, stated that "[t]he State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."[85] Therefore, even in cases where a federal issue is raised, resolution of a dispositive state-law question would obviate any need for a state court to reach the federal issue or to base its decision on federal law.[86] So long as the state law is "independent" of federal law and is "adequate" to dispose of the case, state law is a completely sufficient basis for the decision.[87]

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83. "[S]ince 1970, state appellate courts around the country have decided more than 400 cases in which they have paid more deference to civil rights than has the United States Supreme Court." J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 1 (1987); *see also* Brown v. State, 657 S.W.2d 797, 808 (Tex. Crim. App. 1983)(en banc)(Teague, J., dissenting)("Henceforth, persons of this country must look to their State legislatures and their independent appellate judiciaries for whatever rights, liberties, and freedoms they want to have.").

84. 87 U.S. (20 Wall.) 590 (1875).

85. *Id.* at 626.

86. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.13 (3d ed. 1986)(discussing intricacies of federal court review of state court decisions).

87. *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945)(Supreme Court will not review state court decisions resting on "adequate and independent state grounds").

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B. *Reliance on Both State and Federal Constitutions in Criminal Prosecutions*

What commonly occurs in criminal prosecutions, however, is that equivalent state and federal constitutionally based protections are invoked. It is an accepted constitutional principle that the United States Constitution contains no impediment to a state interpreting its own constitution in such a manner that the defendant is given greater rights than those accorded by the comparable federal constitutional provision.[88] This was confirmed recently in a number of Supreme Court cases. For example, in *Batson v. Kentucky*,[89] the Supreme Court overruled *Swain v. Alabama*,[90] concluding that the equal protection clause of the fourteenth amendment prohibits the racially discriminatory exercise of peremptory challenges by the State.[91] In reaching that decision, the Supreme Court noted that several state courts had already reached the same conclusion by construing their states' constitutions.[92]

1. Police Misconduct and Right to Counsel

a. *Moran v. Burbine*

Later, in *Moran v. Burbine*,[93] the Supreme Court addressed the problems of deceptive police conduct that resulted in the acquisition of a confession, and a defendant's right to counsel. Consistent with the "conservative activism" of the Court, the deceptive police conduct prevailed.[94] In the case, the defendant was arrested for a burglary

88. *See* Cooper v. California, 386 U.S. 58, 62 (1967)(state courts free to impose stricter standards for searches and seizures than mandated by federal Constitution); *see also* State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974)(even when wording of federal Constitution identical to state constitution, state has power to give more protection to individual rights than provided by federal law).

89. __ U.S. __, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

90. 380 U.S. 202, 836-38 (1965)(defendant may not prove purposeful racial discrimination in prosecutor's peremptory challenges by relying only on facts of case at bar; defendant must prove systematic exclusion over period of time), *overruled*, Batson v. Kentucky, __ U.S. __, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

91. *See* Batson v. Kentucky, __ U.S. __, __, 106 S. Ct. 1712, 1722-23, 90 L. Ed. 2d 69, 87 (1986)(pattern of discrimination unnecessary as predicate to equal protection argument).

92. *See id.* at __ n.1, 106 S. Ct. at 1714-15 n.1, 90 L. Ed. 2d at 77-78 n.1 (noting disagreement among both state and federal courts concerning use of peremptory challenges in particular instances).

93. 475 U.S. 412 (1986).

94. *See id.* at 433-34 (police conduct in instant case does not "shock [ ] the sensibilities of civilized society").

offense and jailed.[95] Shortly before this arrest, he was connected to and became the prime suspect in a recent, unrelated murder.[96] While he was incarcerated and without his knowledge, the defendant's sister obtained for him an attorney from the public defender's office.[97] An attorney representing the defendant called the police, advised them of his representation, and asked the police if they intended to question the defendant or place him in a lineup.[98] A police representative told the attorney that the police would not question Burbine or put him in a lineup and " 'that they were through with him for the night.' "[99] The attorney was not told that police from another city were waiting to question the defendant about the murder.[100]

Shortly after this telephone conversation, the police began questioning the defendant about the murder. Prior to each interrogation session, the defendant was given his *Miranda* warnings and expressly waived his right to an attorney.[101] However, the defendant was never advised that an attorney had already been obtained to represent him.[102] Later, the defendant confessed to the murder and was convicted.[103]

The United States Supreme Court identified the ultimate issue as follows: "We granted certiorari to decide whether a prearraignment confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him."[104] The Court answered in the negative to each aspect of the issue.[105] In the process, the Court offered the following implicit invitation to the states:

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95. *See id.* at 416 (suspect arrested for burglary in Cranston, Rhode Island).

96. *See id.* (confidential informant gave information concerning murder to police).

97. *Id.* at 416-17 (suspect's sister sought legal assistance concerning burglary offense).

98. *See id.* at 417.

99. *Id.* (quoting State v. Burbine, 451 A.2d 22, 24 (R.I. 1982)).

100. *Id.* at 416-17 (murder had been committed in Providence, Rhode Island, and Providence police came to Cranston to question suspect).

101. *Id.* at 417-18 (police conducted series of interviews pertaining to murder, and suspect signed waiver of rights three separate times).

102. *Id.* at 417.

103. *Id.* at 418 (suspect signed three confessions and was later convicted of murder in first degree).

104. *Id.* at 420.

105. *See id.* at 424 (limiting police conduct concerning attorneys beyond scope of *Miranda*); *see also id.* at 422 (events outside suspect's presence unrelated to voluntary and knowing decision to relinquish rights).

> Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions.[106]

b. *People v. Houston*

Responding to the Supreme Court's comment that state constitutions could provide relief that the federal Constitution does not provide, the California Supreme Court expressly declined to follow *Moran v. Burbine*. In *People v. Houston*,[107] the defendant was arrested, prosecuted, and convicted of selling cocaine.[108] Following his arrest, two of the defendant's friends retained a lawyer to represent him.[109] The attorney immediately contacted the police department holding the defendant and spoke with one of the interrogating officers.[110] The attorney advised the officer that he was representing the defendant and would arrive at the police station shortly, and requested that nothing further be done with the defendant until he arrived. According to the defendant's attorney, the police officer said he was "not sure" whether the defendant was there, but if the defendant was there, he would "relay the message."[111]

The attorney arrived at the police station within thirty minutes of his telephone conversation with the police officer. After the attorney identified himself, he was told that the defendant was still being questioned; the attorney was not permitted to speak to the defendant for over an hour. During this time, the defendant was never told that his attorney had called or arrived at the station.[112] Thus, as in *Moran v. Burbine*, the police engaged in conduct deceptive by commission (advising the attorney that he would relay the message to the defendant and failing to do so) and omission (not telling the defendant that his attorney had called or was at the police station). Also as in *Moran*,

106. *Id.* at 428.

107. 724 P.2d 1166 (Cal. 1986).

108. *See id.* at 1167-68.

109. *See id.* at 1168 (friends contacted attorney who had given legal advice to defendant on previous occasions).

110. *Id.* (attorney called police station less than one hour after defendant's arrest).

111. *Id.*

112. *Id.*

the defendant gave a confession.[113]

The trial court concluded that the confession was voluntary but admitted that whether the defendant's confession was obtained before or after the attorney's attempted intervention was uncertain.[114] The California Supreme Court was not plagued with such doubt. That court observed that it was the State's responsibility to prove beyond a reasonable doubt that questioning had been completed before the attorney arrived, and that the State had not sustained its burden.[115]

Specifically observing the United States Supreme Court's implicit invitation to apply a more pervasive standard than that announced in *Moran*,[116] the California Supreme Court did exactly that. The California court simply held:

> If the lawyer comes to the station before interrogation begins or while it is still in progress, the suspect must promptly be told, and if he then wishes to see his counsel, he must be allowed to do so. Moreover, the police may not engage in conduct, intentional or grossly negligent, which is calculated to mislead, delay, or dissuade counsel in his efforts to reach his client. Such conduct constitutes a denial of a California suspect's *Miranda* rights to counsel, and his independent right to assistance of counsel, and it invalidates any subsequent statements.[117]

This holding, which is diametrically opposed to that in *Moran*, is predicated entirely and necessarily upon the California Constitution. In its opinion, the California Supreme Court observed that the California Constitution is a document independent from the federal Constitution and that by its language declares its independence from the United States Constitution: "its guarantees 'are not dependent on those [provided] by the United States Constitution.' "[118]

One strength of this opinion is the court's identification of the source of the Declaration of Rights in the California Constitution as "the constitutions of other states" rather than the "federal char-

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113. *Id.* (defendant gave detailed confession regarding narcotics transaction by self and supplier).

114. *See id.* (trial court acknowledged that state's burden not met if burden was to prove inculpatory statements made before attorney's attempted intervention).

115. *See id.* at 1177 (reasonable doubt standard applicable when determining whether confession voluntary and when determining whether confession obtained in violation of right to counsel).

116. *See id.* at 1174 (states free to rely on state law)(citing Moran v. Burbine, 475 U.S. 412, 428 (1986)).

117. *Id.* at 1175 (footnotes omitted).

118. *Id.* at 1174 (quoting CAL. CONST. art. I, § 24).

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ter."[119] The weakness of the opinion, rather surprisingly considering its otherwise conclusive and extensive content, is that the particular provision of the California constitution that is relied upon to depart from *Moran* is not identified.[120]

c. *Dunn v. State*

While *Moran v. Burbine* was pending in the United States Supreme Court,[121] the Texas Court of Criminal Appeals confronted the same issue—police misconduct and right to counsel. Although unable to decide the case by responding to the Supreme Court's as yet unextended invitation in *Moran* to look to state law, the Texas court nevertheless decided in *Dunn v. State*[122] that under the facts of that case the action of the police in preventing the defendant's attorneys from seeing their client invalidated the defendant's confession because he did not intelligently and knowingly waive his right to counsel before he gave the confession.[123] In *Dunn*, the defendant appeared at the police station upon police request.[124] Following this voluntary action, the defendant was told that he was a suspect in his father's death.[125] One of the investigating officers testified that "he would not . . . allow[ ] [defendant] to leave police headquarters until he participated in a lineup."[126] Following the lineup and after receiving his sec-

119. *Id.* at 1174 n.13 (legislative history clear that *state* constitution of 1849 and 1878 intended to protect citizens from arbitrary state action)(emphasis in original).

120. *See id.* at 1174. In rejecting *Moran*, the majority merely stated that "[f]or purposes of the California Constitution," the reasoning set forth in the *Moran* dissent would be adopted. *Id.* Florida has also accepted the Supreme Court's invitation to expand rights, stating in *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987), that police conduct preventing an attorney from seeing his client is unacceptable and that, therefore, a defendant's inculpatory statement must be suppressed. *See id.* at 1190. Interestingly, however, the Florida Supreme Court did not reach the right to counsel question. That court concluded that the police conduct in the case, which the court identified as "egregious," was a violation of due process under the Florida Constitution. *See id.* (attorney permitted to see client only after two telephone calls from judge to police). And, unlike the opinion in *People v. Houston*, the Florida court expressly identified the offended provision as article I, section 9, of the Florida Constitution. *Id.*

121. *See supra* text accompanying notes 93-106.

122. 696 S.W.2d 561 (Tex. Crim. App. 1985).

123. *See id.* at 569 (if defendant had known attorney present, might have chosen to remain silent).

124. *See id.* at 564 (day after father's death, detective asked defendant to appear at police department at end of his business day).

125. *Id.*

126. *Id.*

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ond *Miranda* warnings,[127] the defendant began giving a confession. Over five hours later, he signed a typed confession.[128]

While the interrogation was proceeding, and unknown to the defendant, his wife had retained an attorney, Schultz, to represent him.[129] Schultz immediately acquired the assistance of another attorney, a criminal law specialist named Schneider. Schneider called the police and advised them that he did not want them to speak with his client until he arrived. Schultz and Schneider arrived at the police station shortly thereafter and the adventure began.[130] Initially, they were told that the defendant was not in the jail. Then they were told that he was being questioned. Upon being advised of this, Schneider and Schultz did the following: demanded to see their client; requested that the police tell the defendant they were there; and asked that the police give the defendant Schultz's business card.[131] The police, relying upon the advice of an assistant Harris County prosecutor, rejected all of the attorneys' efforts to make contact with their client.[132]

Judge Campbell's scholarly analysis of the defendant's contentions is divided according to the claimed constitutional violations. Writing for the majority, Judge Campbell first rejected the sixth amendment right to counsel claim because "[t]he mere arrest and subsequent questioning of a person do not constitute a sufficient formalization of proceedings to trigger the requirement of counsel under the Sixth Amendment."[133] Second, the court concluded that "an accused's right against self-incrimination [under the fifth amendment] is personal, and cannot be invoked or waived by anyone other than the

127. *See id.* (defendant given oral *Miranda* warnings before lineup and again before three-hour interrogation session).

128. *See id.* (detective typed three-page confession). The defendant also initialed a *Miranda* warning included in the typed confession.

129. *See id.* The attorney had previously represented the defendant in a commercial matter. *Id.*

130. *See id.* The attorneys arrived at the police station less than an hour after the telephone conversation. *See id.*

131. *See id.*

132. *Id.* (district attorney advised that suspect's waiver of right to counsel destroyed attorney's right to interrupt interrogation session). The defendant's attorneys then telephoned the district attorney's office, requesting authority to contact their client. When this request was denied, the attorneys attempted to send telegrams to their client and to the police, but the telegrams were never delivered. *See id.* at 564-65.

133. *Id.* at 565 (right to counsel applicable when adversarial judicial proceedings initiated).

accused."[134] Finally, the court considered the issue of waiver of right to counsel. Acknowledging that the issue is intertwined with the personal character of the waiver of self-incrimination but "distinctly different" from it, the court examined the question of whether the police's preventing the attorneys from seeing the defendant or failing to advise the defendant that his attorneys were present "negates the knowing and voluntary nature of the waiver of the right to presence of counsel."[135] Responding to its own inquiry, the court reasoned that the waiver of counsel was *voluntary* because there was no evidence whatsoever to suggest otherwise.[136] Whether the waiver of counsel was *knowingly* obtained was, as the court noted, "[t]he difficult question."[137]

After reviewing the decisions of the Delaware Supreme Court,[138] Rhode Island Supreme Court,[139] and the New York Court of Appeals,[140] the court concluded that rather than state a firm rule, the "more rational approach in assaying the validity of the waiver relied upon by the State, is for this Court to examine all of the pertinent facts and circumstances of the case."[141] Observing that "[t]he attorneys hired by appellant's wife . . . did everything short of kicking in the interrogation room door to gain access to appellant,"[142] the court held that although his waiver of counsel was voluntary, it was not an intelligent and knowing waiver of the right to counsel.[143]

Beyond the court's ruling there are several rather interesting things

134. *Id.* at 567.

135. *Id.*

136. *Id.* at 568 (voluntary waiver "pretty easily" established where defendant not intimidated, ignorant, or confused).

137. *Id.*

138. *See id.* (citing Weber v. State, 457 A.2d 674, 686 (Del. 1983)(police failure to inform suspect of attorney's presence prevents knowing waiver of right to counsel).

139. *See id.* at 567-68 (citing State v. Burbine, 451 A.2d 22, 29 (R.I. 1982)(in determining quantum of information suspect needs to make knowing waiver, court must balance privilege against self-incrimination and needs of law enforcement community).

140. *See id.* at 568. The court cited *People v. Hobson*, 348 N.E.2d 894, 896 (N.Y. 1976)(after attorney agrees to representation, custodial defendant's waiver of right to counsel ineffective if attorney absent); *People v. Arthur*, 239 N.E.2d 537, 539 (N.Y. 1968)(right to counsel attaches as soon as police are advised that attorney represents defendant); and *People v. Donovan*, 193 N.E.2d 628, 629 (N.Y. 1963)(written confession inadmissible where police prevented attorney from seeing custodial defendant).

141. *Dunn*, 696 S.W.2d at 568.

142. *Id.* at 569.

143. *See id.* (totality of facts and circumstances require conclusion that waiver not knowing and intelligent).

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about the opinion. First, the court specifically recognized that *Moran v. Burbine* was awaiting review by the Supreme Court.[144] Second, and despite certiorari being granted in *Moran*, the case was reviewed only in light of the fifth and sixth amendments to the United States Constitution.[145] Third, even though there was no analysis of the comparable state constitutional right to counsel, the concluding paragraph of the opinion stated that the defendant's confession was acquired in violation of not only the federal constitutional guarantee but also of article I, section 10 of the Texas Constitution.[146]

2. Impermissible Seizure Following Traffic Violation

The conservative movement of the Supreme Court is being rejected by some state appellate courts in instances besides those involved in *Moran*.[147] In *State v. Kim*,[148] the Hawaii Supreme Court challenged the United States Supreme Court's holding in *Pennsylvania v. Mimms*[149] that ordering a driver stopped for a traffic violation to get out of his car is not an impermissible seizure under the fourth amendment.[150] Previously, in a footnote to *State v. Wyatt*,[151] the Hawaii Supreme Court had indicated that they did not consider themselves bound by *Mimms*, stating that " 'as the ultimate judicial tribunal' with final, unreviewable authority to interpret and enforce the Hawaii Constitution,' " they were not prepared to concur with such decision.[152] In *Kim*, the Hawaii court removed any question as to their attitude about *Mimms*, stating that "to hold that a valid traffic stop of itself provides reason to order the driver to get out of the vehicle" would be in contravention of article I, section 7, of the Hawaii Consti-

144. *Id.* at 568 n.2.

145. *See supra* text accompanying notes 133-35.

146. *Dunn*, 696 S.W.2d at 569-70 (noting violation of state constitution without discussing same).

147. For an excellent review of state cases rejecting United States Supreme Court decisions, see generally Greenhalgh, *Independent and Adequate State Grounds: The Long and Short of It*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 211, 222-33 (B. McGraw ed. 1985).

148. 711 P.2d 1291 (Haw. 1985).

149. 434 U.S. 106 (1977).

150. *See id.* at 109-11 (reasonableness under fourth amendment permits balancing mere inconvenience of intrusion into suspect's personal liberty with legitimate and weighty concern for police officer's safety).

151. 687 P.2d 544 (Haw. 1984).

152. *Id.* at 552 n.9 (quoting State v. Kaluna, 520 P.2d 51, 58 (Haw. 1974)).

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tution.[153] Accordingly, the court held:

> We decline to adopt the standard established in *Mimms* by the United States Supreme Court. We instead hold that, under article I, section 7 of the Hawaii Constitution, a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop.[154]

3. "Equivalent" Request for Counsel

In 1983, the Montana Supreme Court stated that the Montana Constitution's right against self-incrimination does not afford greater protection than that afforded under the federal Constitution.[155] Later reversing that position, the Montana Supreme Court in *State v. Johnson*[156] refused "to 'march lock-step' with the United States Supreme Court where constitutional issues are concerned."[157] Despite nearly identical language in the fifth amendment and other similar provisions of the United States Constitution,[158] the Montana court decided that a suspect's request to speak with "someone" after being read his rights under *Miranda* is the equivalent of a request for counsel,[159] and refusing to honor the request violates the right to counsel under the Montana Constitution.[160] Consequently, any statements taken after the request are in violation of the self-incrimination clauses of both the state and federal constitutions.[161] This Montana case is contrary to *Fare v. Michael C.*,[162] in which the United States Supreme Court decided that a request to see a probation officer was not the equivalent of a request for counsel as discussed in *Miranda*.[163]

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153. State v. Kim, 711 P.2d 1291, 1293-94 (Haw. 1985)(quoting State v. Wyatt, 687 P.2d 544, 552 n.9 (Haw. 1984)). The Court in *Kim* stated that *Wyatt*'s footnote nine was not dicta. *See id.* at 1294.

154. *Id.*

155. *See* State v. Jackson, 672 P.2d 255, 260 (Mont. 1983).

156. 719 P.2d 1248 (Mont. 1986).

157. *Id.* at 1254-55 (Montana court will rely on state law when independent and adequate state grounds exist for decision).

158. *See id.* at 1254-55 (discussing case law that analyzed state and federal constitutional provisions in criminal and civil matters).

159. *See id.* at 1255 (request for "someone" after hearing *Miranda* warnings refers to legal advisor).

160. *Id.*

161. *Id.*

162. 442 U.S. 707 (1979).

163. *See id.* at 723 (request to see probation officer not invocation of fifth amendment).

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4. Miscellaneous Criminal Issues

Further exemplifying the seeming popularity in rejecting Supreme Court decisions on state constitutional grounds is *State v. Gunwall*,[164] which held that the Washington Constitution prohibits the warrantless seizure of phone records and use of a pen register.[165] In so ruling, the Washington Supreme Court refused to adopt the contrary fourth amendment rule of *Smith v. Maryland*.[166] Further, in *State v. Novembrino*,[167] the New Jersey Supreme Court rejected, on state constitutional grounds, the reasonable-officer exception to the exclusionary rule from *United States v. Leon*.[168] In addition, the Oklahoma Supreme Court concluded that under that state's constitution, illegally seized evidence should be suppressed in civil as well as criminal proceedings.[169] In doing so, the Oklahoma court declined to adopt the contrary rule of *United States v. Janis*.[170]

5. Effective Assistance of Appellate Counsel

In *Killingsworth v. State*,[171] the Mississippi Supreme Court concluded that the guaranties of effective assistance of appellate counsel, as detailed in *Anders v. California*,[172] are not sufficient under the Mississippi Constitution.[173] *Anders* authorizes court-appointed appellate counsel to withdraw if the attorney concludes that the defendant's

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164. 720 P.2d 808 (Wash. 1986)(en banc).

165. *See id.* at 813.

166. *See id.* at 814-16 (analyzing state law to refute *Smith v. Maryland*). In *Smith v. Maryland*, the United States Supreme Court held that the use and installation of a pen register does not constitute a "search" under the fourth amendment. Additionally, the Court found that telephone users enjoy no reasonable expectation of privacy in the phone numbers they dial. *See* Smith v. Maryland, 442 U.S. 735, 745-46 (1979).

167. 519 A.2d 820 (N.J. 1987).

168. *See id.* at 857 (*Leon* undermines constitutional standard of probable cause); *see also id.* at 849-57 (interpreting and applying state constitution). For a discussion of *United States v. Leon*, 468 U.S. 897 (1984), see *supra* text accompanying notes 49-53.

169. *See* Turner v. City of Lawton, 733 P.2d 375, 380 (Okla. 1986)(federal Supreme Court cases too restrictive under Oklahoma's standards of fundamental law).

170. *See id.* at 379-80 (distinguishing instant case from *Janis*). In *United States v. Janis*, 428 U.S. 433, 459-60 (1976), the United States Supreme Court held that evidence illegally seized by state law enforcement officers would be admissible in federal civil proceedings. The Court reasoned that the deterrence function of the exclusionary rule is inapplicable in the context of civil proceedings. *See id.* at 453-54.

171. 490 So. 2d 849 (Miss. 1986).

172. 386 U.S. 738 (1967).

173. *See Killingsworth*, 490 So. 2d at 851 (court not bound by *Anders* and may afford greater protection to accused under Mississippi Constitution).

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proposed appeal is without merit.[174] Further, if appellate counsel concludes that his client's appeal is frivolous, the attorney must file a brief with the appellate court identifying "anything in the record that might arguably support the appeal."[175] In addition, the case requires that the defendant be supplied with a copy of the brief and given time to file a pro se brief.[176] If this procedure is followed, then there is no federal constitutional impediment to allowing the defendant's counsel to withdraw.[177]

The Mississippi Supreme Court concluded that its constitution required more from appointed appellate counsel than was required in *Anders*.[178] Observing that Mississippi is "not bound by the minimum federal requirements' of *Anders*,"[179] the court commented that in complying with *Anders*, appellate counsel essentially assumed the role of an amicus curiae rather than "an active advocate in behalf of his client."[180] This alteration of counsel's responsibilities, according to the Mississippi Supreme Court, is not permitted under the Mississippi Constitution.[181]

C. *New Federalism and Freedom of Expression*

A truly remarkable and courageous example of "new federalism" and rejection of Supreme Court authority is *State v. Henry*.[182] In this case, the Oregon Supreme Court decided that "[o]bscene speech, writing or equivalent forms of communication are 'speech' nonetheless"[183] and are therefore entitled to protection from censorship under article I, section 8, of the Oregon Constitution.[184] In reaching this decision, the Oregon court expressly rejected the three-part test of obscenity set

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174. *Anders*, 386 U.S. at 744 (counsel should request permission to withdraw if conscientious examination reveals case wholly frivolous).

175. *Id.*

176. *See id.*

177. *Id.* at 745. If the court determines that any points are arguable, appellate counsel would be appointed to represent the indigent. *Id.* at 744-45.

178. *See* Killingsworth v. State, 490 So. 2d 849, 850 (Miss. 1986).

179. *Id.* at 851.

180. *Id.* (quoting Anders v. California, 386 U.S. 738, 744 (1967)).

181. *See id.* (attorney's conscientious determination that appeal without merit not tantamount to good cause).

182. 732 P.2d 9 (Or. 1987).

183. *Id.* at 17.

184. *See id.* at 17 (obscenity no exception to plain language of state constitution); *see also id.* at 10 (no law shall restrain free expression)(citing OR. CONST. art. I, § 8).

forth by the United States Supreme Court in *Miller v. California*.[185] Supporting their decision, the Oregon court does something that some other state courts fail to do: it distinguishes and analyzes the relevant language in the federal Constitution and the state constitution.[186] The court states, for example, that the Oregon Constitution "sets forth in plain words that '[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely any subject whatever; but every person shall be responsible for abuse of this right.' "[187] The first amendment to the United States Constitution, however, merely "restrains abridging the freedom of speech, or of the press."[188]

In contrasting the two provisions, the court stated that it is evident that the Oregon Constitution "is broader and covers any expressions of opinion, including verbal and nonverbal expressions contained in films, pictures, paintings, sculpture and the like."[189] Therefore, "[i]n this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.' "[190]

III. Direct Review of State Court Judgments by the United States Supreme Court

A. *Defining Adequate and Independent State Grounds*

1. Inconsistent Assertions of Jurisdiction

The arguably confrontational stance assumed by some state courts when they interpret their state constitutions more liberally than the United States Supreme Court interprets an equivalent federal constitutional provision has produced inconsistent and confusing reactions by the Supreme Court when that Court is asked to review a state's

185. *Id.* at 17 (*Miller* test forbidden censorship per Oregon Constitution). *Miller v. California*, 413 U.S. 15, 24 (1973), allows censorship of obscenity only if (a) " 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted).

186. *See generally* State v. Henry, 732 P.2d 9, 10-17 (Or. 1987).

187. *Id.* at 10 (quoting Or. Const. art. I, § 8).

188. *Id.* at 11 (quoting U.S. Const. amend. I).

189. *Id.*

190. *Id.* at 18.

case.[191] As previously noted, it has historically been a commonly accepted principle of federal constitutional law that state court decisions that are based on "independent and adequate state grounds" are not subject to review by the Supreme Court.[192] This view is consistent with the idea of state sovereignty. In fact, Justice Jackson, writing for the majority in *Herb v. Pitcairn*,[193] recognized that the Supreme Court could correct state judgments only when they incorrectly adjudged federal rights.[194] Accordingly, the Warren Court actively and by necessity began not finding independent and adequate state grounds so as to prevent states from depriving their citizens of their federal rights.[195] Now, however, the pendulum has swung in the opposite direction. The Burger and Rehnquist Courts began not finding independent and adequate state grounds so as to prevent states from expanding, not limiting, federally guaranteed rights.[196]

The Burger Court's apparent preoccupation with the dominance of the federal judiciary became readily apparent in *Delaware v. Prouse*.[197] In that case, a majority of the Court, without the citation of authority, erroneously concluded that "even if the State Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution."[198] The defect in this conclusion is that the Delaware Supreme Court based its decision upon both state and federal grounds.[199] Therefore, the Supreme Court was actually and rather presumptuously stating that the Delaware Supreme Court will

191. Greenhalgh, *Independent and Adequate State Grounds: The Long and Short of It*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 211, 211 (B. McGraw ed. 1985)(standard of review to be applied by Supreme Court uncertain because of increased reliance on independent and adequate state grounds).

192. *See supra* text accompanying notes 83-86.

193. 324 U.S. 117 (1945).

194. *See id* at 126. If it is unclear whether the state court was deciding a federal question or making a judgment based on independent and adequate state grounds, the Court will ask the state court for clarification. *Id.* at 128.

195. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 478 n.2 (1968)(where state court found that neither federal nor state constitution specified population as determinative of apportionment method, state court judgment not based on independent state ground); Williams v. Georgia, 349 U.S. 375, 399 (1955)(purported state ground not independent and adequate if interpretation of state law intended to abrogate federal right or unreasonably interferes with vindication of federal rights).

196. *See infra* text accompanying notes 197-213.

197. 440 U.S. 648 (1979).

198. *Id.* at 652. *Prouse* was a search and seizure case. *See id.* at 650.

199. State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978)(violation of federal fourth amend-

automatically interpret its state constitution so as to comport with Supreme Court interpretations of the federal constitution.

Next came *South Dakota v. Neville*,[200] which merely exacerbated the difficulty. In *State v. Neville*,[201] the South Dakota Supreme Court had found that admitting into evidence a defendant's refusal to submit to a breath test violated the defendant's federal and state privileges against self-incrimination.[202] The United States Supreme Court ignored the principle that state constitutional rights may be broader than similar federal constitutional rights, and reversed the South Dakota Supreme Court with another presumptuous conclusion: "The [state] court . . . simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege."[203] Apparently, the United States Supreme Court could not conceive that the state court was construing its constitutional right more broadly than the fifth amendment.[204]

Inconsistently with its decisions to assume, albeit erroneously, the harmony of state and federal claims, the Supreme Court had previously decided that if the basis of the state court's conclusion was not evident, it would reject jurisdiction and dismiss the appeal.[205] In later but similar instances, the Court had vacated the state court judg-

ment necessarily violation of state constitution's "substantially similar" provision), *aff'd*, 440 U.S. 648 (1979).

200. 459 U.S. 553 (1983).

201. 312 N.W.2d 723 (S.D. 1981), *rev'd sub nom.* South Dakota v. Neville, 459 U.S. 553 (1983).

202. *See id.* at 725 (because suspect must choose between refusal to submit to test and producing testimonial evidence, voluntariness of evidence doubtful).

203. South Dakota v. Neville, 459 U.S. 553, 556-57 n.5 (1983).

204. *See id.* at 570 (Stevens, J., dissenting) (state court explicit in noting "more liberal" language of state constitution) (quoting State v. Neville, 312 N.W.2d 723, 726 n.* (S.D. 1981), *rev'd sub nom.* South Dakota v. Neville, 459 U.S. 553 (1983)). Justice Stevens criticized the majority's assumption that a state court would modify its interpretation of state law to comport with the United States Supreme Court's interpretation of comparable federal law. *See id.* at 568 (Stevens, J., dissenting). Although the South Dakota Supreme Court had found it unnecessary to distinguish between the state and federal constitutional provisions when the case first came before the court, *see* State v. Neville, 312 N.W.2d 723, 726 n.* (S.D. 1981), *rev'd sub nom.* South Dakota v. Neville, 459 U.S. 553 (1983), upon remand from the United States Supreme Court, the state supreme court explained that "to give *evidence* against himself" in the state constitution plainly means something different than "to be a *witness* against himself" in the federal constitution. State v. Neville, 346 N.W.2d 425, 428 (S.D. 1984)(quoting OR. CONST. art. VI, § 9 and U.S. CONST. amend. V)(emphasis in original).

205. Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54 (1934)(Supreme Court has jurisdiction only when record affirmatively shows federal question necessary to state court judgment).

ment.[206] In still another case, the Court chose to abate the appeal and return the case to the state court for clarification of the state decision.[207] Finally, the Court has itself examined state law to determine whether the state court opinion was based on federal or state principles.[208]

2. *Michigan v. Long*

Consequently, rather than establish a firm standard for invoking its jurisdiction, the Court instead has historically elected to review each case on an ad hoc basis and act according to the majority's whim. Recognizing that "[t]his ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved,"[209] the Supreme Court in *Michigan v. Long*[210] finally established a standard on which to rely in determining whether or not to exercise jurisdiction. Professing its respect for the independence of state courts and in an effort to avoid issuing advisory opinions, the Court stated:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[211]

Therefore, if the state court opinion cites both state and federal precedent, the Court will presume that United States Supreme Court interpretation of the constitutional principle is the standard that dictated the result.

The presumption will be defeated under some circumstances:

> If a state court chooses merely to rely on federal precedents as it would

206. Minnesota v. National Tea Co., 309 U.S. 551, 555-56 (1940)(state court judgment vacated and remanded for clarification of basis of decision).

207. Herb v. Pitcairn, 324 U.S. 117, 128 (1945)(cause of action continued for state court amendment stating federal or state basis of judgment).

208. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 732-33 n.1 (1983)(state court opinion "rests squarely" on federal fourth amendment); Oregon v. Kennedy, 456 U.S. 667, 671 (1982)(extent of state court reliance on federal law sufficient to invoke Supreme Court's jurisdiction).

209. Michigan v. Long, 463 U.S. 1032, 1039 (1983).

210. 463 U.S. 1032 (1983).

211. *Id.* at 1040-41.

> on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[212]

Further:

> If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[213]

3. Criticism of *Michigan v. Long*

Michigan v. Long has been extensively criticized. For example, one commentator stated that "[t]his 'assumption' of jurisdiction is altogether characteristic of the Burger Court's perceived need to police the outer boundaries of the federal Constitution, especially in criminal justice cases."[214] Further, and even more direct, is the claim that "the approach adopted in *Long* seems to encourage potential federal judicial interference with both state judicial and constitutional discretion."[215] And, "[o]ne can only speculate that the reason for the Court's seeming behavioral shift was the fact that the state court in *Long* had *extended* civil liberties protection beyond the substantive federal standard, while in the previous decisions the supposedly incidental substantive impact of the Court's procedural limitations on federal interference had been a probable *reduction* in civil liberties protection."[216]

The intrusive nature of the spurious presumption that constitutes the basis of *Long*'s solution to the problem of Supreme Court jurisdiction is contradictory to the Court's previously announced theories of federalism and renders meaningless its expressions of respect for state court independence. But the most serious disservice that *Michigan v. Long* does to state courts and their exclusive authority to interpret state constitutional claims is that requiring the state court to rebut the presumption leaves the state court vulnerable to a claim that the fed-

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212. *Id.* at 1041.

213. *Id.*

214. Collins, *Reliance on State Constitution: Some Random Thoughts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 1, 10 & n. 79 (B. McGraw ed. 1985)(discussing "assumptions" and "presumptions" in *Long*).

215. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 863 (1985).

216. *Id.*

eral disclaimer was included in the opinion only to avoid Supreme Court review. Thus, state courts, rather than merely adjudicating state constitutional claims, must be prepared to defend their integrity by both quantitatively and qualitatively supporting their opinion with state authority.

B. *Relying on State Constitutions to Protect Individual Rights and Liberties*

1. Textual Similarities and Dissimilarities

Although criticism will inevitably flow from some corners of the criminal justice system when a state court is more conscious of personal liberties than is the United States Supreme Court, the state courts can be confident that historically there is "no doubt that state declarations of rights were never intended to be dependent on or interpreted in light of the United States Bill of Rights."[217] Beyond this historical truism are more concrete factors that are available to a state court when it examines comparable state and federal constitutional rights.[218] The most obvious consideration is textual similarity. For example, in adopting the "totality of the circumstances" test, the Texas Court of Criminal Appeals in *Eisenhauer v. State*[219] compared article I, section 9 of the Texas Constitution and the fourth amendment of the federal Constitution, and concluded that the two provisions are "in all material aspects, the same."[220] Somewhat to the contrary, in *Long v. State*,[221] the Texas Court of Criminal Appeals held a portion of the child videotape statute[222] unconstitutional in

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217. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 239, 243 (B. McGraw ed. 1985); *see also supra* text accompanying notes 25-37.

218. *See* State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986)(en banc). The court sets forth six criteria for determining whether the state's constitution extends broader rights to citizens than does the United States Constitution: (1) the state constitution's explicit language; (2) textual differences between parallel state and federal constitutional provisions; (3) state common law and constitutional history; (4) preexisting state case and statutory law; (5) structural differences between the state and federal constitutions (e.g., grants of enumerated powers, limits on sovereign power, affirmation of fundamental rights); and (6) matters of local or state interests. *See id.*

219. No. 149-85 (Tex. Crim. App. March 23, 1988).

220. *Id.* at 6.

221. 742 S.W.2d 302 (Tex. Crim. App. 1987).

222. *See* Act of June 19, 1983, ch. 599, § 2(a), 1983 Tex. Gen. Laws 3828, 3829 (permitting pre-trial videotape interview of alleged victim of sexual abuse where victim is child twelve

that it violated both the due process clause of the fourteenth amendment of the federal Constitution and the due course of law provision of article I, section 19, of the Texas Constitution.[223] Noting that in the context of the instant case it was unnecessary to give the due course of law provision of the Texas Constitution a broader meaning than due process under the fourteenth amendment, the court nevertheless noted that "[a]s recent[ly] as 1982 . . . the United States Supreme Court commented that Art. I, § 19, 'is different from, and arguably significantly broader than . . .' the comparable Fourteenth Amendment."[224]

2. Constitutional History

This is not to say that textual similarities or dissimilarities can alone dictate a resolution. On the contrary, the textual relationship of the provisions must be kept in perspective and examined proportionately to its relationship with other matters. The history of a state's constitution, for example, can be another valuable source of information about interpretation, and the social and political setting in which a particular provision originated can be quite persuasive as to how it should be interpreted. The Texas Constitution is particularly unique in this respect, because it is the only constitution that was derived from its own independent, national constitution. As observed by Judge Miller while dissenting in *Osban v. State*,[225]

> Texas was never a territory. We were an independent nation from 1836 to 1846 and we joined the Union then by treaty—one sovereign to another. After joining the Union we carried over the written principles

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years of age or younger), *amended by* Act of Aug. 4, 1987, ch. 55, § 2(c), 1987 Tex. Sess. Law. Serv. 365, 367 (Vernon), *codified at* TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2(c) (Vernon Supp. 1987). For a discussion of problems facing the criminal justice system in addressing the needs of child victims of sexual abuse, see generally Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L. J. 279 (1986).

223. *See* Long v. State, 742 S.W.2d 302, 320-21 (Tex. Crim. App. 1987)(due process abrogated when defendant must choose between opportunity to cross-examine complainant and allowing prosecution to repeat videotaped testimony).

224. *Id.* at 319-20 (citations omitted). In a footnote, the court stressed that the analysis in the case was made independently of comparable federal constitutional provisions. *See id.* at 323 n.22. For a discussion of *Long*, see generally Note, *Criminal Law—Right of Confrontation — Admission of Pre-Trial Videotaped Testimony of Sexually Abused Child Pursuant to Article 38.071, Section 2, Texas Code of Criminal Procedure Violates Right of Confrontation and Due Process*, 19 ST. MARY'S L.J. 413 (1987).

225. 726 S.W.2d 107 (Tex Crim App. 1986).

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> upon which our Country (Texas) was founded into the principles of government of our State. As such we have and we pride ourselves in having our own concepts of what our Constitution means to us.[226]

Because of Texas's unusual history there is even more legitimacy in examining the history of the Texas Constitution.

3. State Precedent

Another consideration is the state precedent that existed before the comparable federal right was applied to the states. For example, in *Long v. State*,[227] the Texas Court of Criminal Appeals resolved the confrontation issue precipitated by the child videotape statute[228] by citing two Texas Court of Criminal Appeals cases that recognized a defendant's right of confrontation[229] and which were decided before *Pointer v. Texas*.[230] The significance of this approach is evident: the Texas court elected, at least in part, to decide a case on the principle of state court *stare decisis*.[231] Thus, preexisting state law can assist in defining the scope of a state constitutional right that was only later recognized as a federally guaranteed right.

4. Policy Considerations

In addition to the preceding factors, state courts can examine their

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226. *Id.* at 119-20 (Miller, J., dissenting). Actually, "Texans have lived under nine constitutions. Three were written while Texas was part of Mexico: the liberal Spanish Constitution of 1812; the Mexican Republic's 1824 Constitution, which gave Texas, then part of the Mexican State of Coahuila, a certain measure of independence from the central government in Mexico City; and the constitution which the State of Coahuila y Texas published in 1827." J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 17 (1987). Six additional constitutions were to guide Texas as a Republic, then as a state. *Id.*; *see also* J. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS: FROM 1776 TO THE END OF THE YEAR 1914, at 16-17 (1972)(brief summary of Texas's decision to join United States).

227. 742 S.W.2d 302 (Tex. Crim. App. 1987).

228. *See supra* text accompanying notes 220-23.

229. *See Long*, 742 S.W.2d at 313 (citing Garcia v. State, 151 Tex. Crim. 593, 601, 210 S.W.2d 574, 580 (1948)(state's failure to provide translator for defendant who spoke only Spanish violated defendant's right to confront his accusers)); *see also id.* at 316 (citing Vasquez v. State, 145 Tex. Crim. 376, 380, 167 S.W.2d 1030, 1032 (1943)(fear and embarrassment of eight-year-old rape victim insufficient to defeat accused's right to confront witness against him)).

230. 380 U.S. 400, 406 (1965)(sixth amendment confrontation guarantee enforced against states through fourteenth amendment).

231. *See Long*, 742 S.W.2d at 313 (state courts have recognized role of cross-examination in right to confront witnesses).

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state constitutionally mandated rights from a policy perspective, but with great caution. The necessity of a state court examining state constitutional rights from a moral and social perspective is the one thing that most significantly distinguishes state courts from the federal judiciary, particularly the United States Supreme Court.[232] Nonetheless, state courts cannot distinguish between closely competing rights by taking the relatively easy step of claiming one or the other constitutional violation simply because there are no moral and social absolutes. Sin is a pragmatic and, to some extent, an economic and geographical issue. For example, in Nevada, gambling, and to a lesser extent prostitution, are legal.[233] In Texas, however, only prostitution is absolutely illegal.[234] In 1985, bingo became a legitimate activity in Texas, if organized for charitable purposes.[235] In 1987, pari-mutuel horse and dog racing became a legitimate activity,[236] largely because of its favorable economic prospects for the State.[237] Thus, although it may appear that our moral convictions are directly proportionate to a state's economic difficulties, it would be totally unacceptable to impose these changes through constitutional interpretation.

Another reason for avoiding policy-based interpretations of a state constitution is the relative ease with which a state constitution can be

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232. *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 3 (5th ed. 1984)(discussing public policy considerations in lawmaking).

233. *See* NEV. REV. STAT. §§ 201.295-440 (1985)(prostitution legal but activities surrounding it restricted); *see also id.* §§ 462.010-466.220 (1985)(regulations for lotteries, gaming establishments, horse and dog racing).

234. *See* TEX. PENAL CODE ANN. §§ 43.01-06 (Vernon 1974 & Supp. 1988)(statutes expressly prohibit prostitution and related activities).

235. *See* TEX. REV. CIV. STAT. ANN. art. 179d (Vernon Supp. 1988)(Bingo Enabling Act).

236. *See id.* art. 179e (Texas Racing Act).

237. *See id.* The statute notes in pertinent part:

> The purposes of this Act are to encourage agriculture, the horse-breeding industry, the horse-training industry, the greyhound-breeding industry, tourism, and employment opportunities in this state related to horse racing and greyhound racing and to provide for the strict regulation and control of pari-mutuel wagering in connection with that racing.

Id. § 1.02. Whether the economic return for the state will in fact be favorable has been hotly debated. *Compare* Donnally, *Texas Horse Racing a Long Shot No More*, Dallas Morning News, Dec. 24, 1984, § B, at 1, col. 2, 8, col. 1 (in addition to pari-mutuel taxes, substantial breeding industry could add two billion dollars to state economy if tracks permitted in major cities) *with* Maley, *Pari-mutuel Debate Off and Running*, Dallas Morning News, Mar. 13, 1983, § G at 1, col. 5 (horse racing revenue will be insignificant).

amended, at times with somewhat unfortunate results. In *Ex parte Crisp*,[238] for example, the Texas Court of Criminal Appeals held that a bill purporting to amend the Texas Controlled Substances Act was unconstitutional because the caption of the bill failed to adequately and constitutionally detail its content.[239] In response to that ruling, the people of Texas passed an amendment to the constitution that provides:

> (a) No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.
> (b) The rules of procedure of each house shall require that the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject. The legislature is solely responsible for determining compliance with the rule.
> (c) A law, including a law enacted before the effective date of this subsection, may not be held void on the basis of an insufficient title.[240]

The effect of that amendment became readily evident in the second called session of the 70th Texas Legislature. Along with a new child videotape statute (in response to *Long v. State*[241]), a rider concerning AIDS testing for alleged rapists was tagged to the bill.[242] Obviously, the AIDS rider was concerned with something other than the principal subject of the bill. It would be pure speculation to even venture a guess as to how many legislators knew of the multiple and arguably unrelated purposes of the legislation.

5. Objective Analysis and the Influence of *Michigan v. Long*

These are merely some of the factors that state courts may consider in examining their own constitutions. Using objective standards when analyzing analogous state and federal constitutional rights may be advantageous, but is hardly mandatory. To require a state court opinion to detail some objectively verifiable difference between the comparable constitutional rights to support its more protective divergence from

238. 661 S.W.2d 944 (Tex. Crim App. 1983).

239. *See id.* at 947 (discussing Tex. H.B. 730, 67th Leg. (1981), as proposed to amend TEX. REV. CIV. STAT. ANN. art. 4476-15). The Court found the caption defective because it failed to mention at least two major statutes which were modified by the Act. *See id.*

240. TEX. CONST. art. 3, § 35.

241. *See supra* text accompanying notes 220-23, 226-30.

242. *See* Act of Aug. 4, 1987, ch. 55, § 3 1987 Tex. Sess. Law Serv. 365, 375-76 (Vernon)(enacting article 21.31 of the Texas Code of Criminal Procedure).

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United States Supreme Court interpretation would be an unacceptable intrusion on the judicial decision making process. There is absolutely nothing inherently improper in state court opinion diverging from United States Supreme Court authority on the very simple ground that there is a viable disagreement on the manner of interpretation. As one commentator has noted: "One could thus conclude that the state courts simply 'disagree' with the United States Supreme Court's perception of the constitutional controversy. The state court could then justify this disagreement in various ways. Our system of federalism has always contemplated such disagreement."[243]

Moreover, as previously noted, under *Michigan v. Long* even an exhaustive analysis of state law oriented authority will be considered insufficient for the United States Supreme Court to find that the state court's opinion is based on adequate and independent state grounds, unless the disclaimer is also in the opinion.[244] Accordingly, in *Long v. State*,[245] the Texas Court of Criminal Appeals noted as follows:

> Our decision that Art. 38.071, § 2, is unconstitutional under both Art. I, § 10 and Art. I, § 19 of the Texas Constitution (1876) is made after a thorough analysis of the statute, the applicable constitutional provisions, and available case law. It was also made independent of our analysis of the comparable constitutional provisions (Sixth and Fourteenth Amendments). Further, any federal cases that were cited in our analysis of the state constitution were used only for the purpose of guidance, and do not themselves compel the result that the Court has reached.[246]

C. *Sequential Review*

If the states' constitutions are sovereign documents that are susceptible to a more expansive interpretation than that interpretation given the federal Constitution by the United States Supreme Court,[247] then the following question necessarily arises: why is it even necessary to examine the corollary federal right if the state right is sufficiently protective of individual liberty? Several state courts, and Justice Stevens

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243. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 368 (1984).

244. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); *see also supra* text accompanying notes 210-12.

245. 742 S.W.2d 302 (Tex. Crim App. 1987).

246. *Id.* at 323 n.22.

247. *See supra* text accompanying notes 83-84.

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of the United States Supreme Court, claim that such a review is not necessary.

Justice Hans Linde of the Oregon Supreme Court is the most recognized proponent of a sequential and progressive review. Writing for the Oregon Supreme Court in *Sterling v. Cupp*,[248] Justice Linde stated:

> The proper sequence is to analyze the state's law, including the constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.[249]

Significantly, this comment was cited with approval by Justice Stevens in *Massachusetts v. Upton*.[250] In his concurring opinion, Justice Stevens criticized the Massachusetts Supreme Court for failing to discuss whether the state constitution offered any protection to the accused before it considered the existence of federal constitutional protections.[251] Agreeing with Justice Linde's method of appellate review, Justice Stevens commented that if the Massachusetts Supreme Court had followed a progressive analysis, finding a violation of a state statute would obviate consideration of a federal constitutional question.[252] Justice Stevens further stated that he saw "no reason why [the state court] should not have followed the same sequence of analysis when an arguable violation of the State Constitution is disclosed."[253]

Justice Stevens made his position even more clear in *Delaware v. Van Arsdall*.[254] Justice Stevens assailed the majority's assumption of jurisdiction as a "further advancement of its own power . . . which flout[ed] this Court's best traditions."[255] In doing so, Justice Stevens again relied upon Justice Linde's comment in *Sterling v. Cupp*.[256] Furthermore, he noted that:

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248. 625 P.2d 123 (Or. 1981)(en banc).

249. *Id.* at 126.

250. 466 U.S. 727, 736 (1984)(Stevens, J., concurring)(quoting Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981)(en banc)).

251. *See id.* at 735-36.

252. *See id.* at 736.

253. *Id.*

254. 475 U.S. 673 (1986).

255. *Id.* at 691 (Stevens, J., dissenting).

256. *Id.* at 701.

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> The emerging preference for state constitutional bases of decision in lieu of federal ones is, in my view, the analytical approach best suited to facilitating the independent role of state constitutions and state courts in our federal system.[257]

The path cleared by the Oregon Supreme Court has been expressly followed by several states. For example, in *State v. Chaisson*,[258] the New Hampshire Supreme Court stated:

> Next, the defendant contends that his warrantless arrest violated both the Federal and the State Constitutions and that the fruits of that arrest, therefore, should have been suppressed at trial. We, of course, address the State constitutional issues first. In construing the State Constitution, we refer to Federal constitutional law as only the benchmark of minimum constitutional protection.[259]

Similar or identical attitudes have been expressed in Arizona,[260] Maine,[261] California[262] and Washington.[263]

IV. Reaction to New Federalism

A. *Voters' Response*

Due in great part to the conservative reaction to the Warren Court's expansion of civil liberties, the idea of "new federalism" has not enjoyed a warm reception by much of the public. The continual and alarming increase in crime statistics,[264] jury verdicts that offend

257. *Id.* at 705.

258. 486 A.2d 297 (N.H. 1984).

259. *Id.* at 301 (citations omitted).

260. *See* Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986)(en banc)(mentally ill prisoner's right to avoid forced administration of drugs considered first in light of state constitutional guarantees).

261. *See* City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985)(constitutionality of obscenity statute tested initially by state constitutional guarantees).

262. *See generally supra* text accompanying notes 106-19.

263. *See* State v. Coe, 679 P.2d 353, 359 (Wash. 1984)(en banc)(order prohibiting broadcast media from transmitting recording tapes played in open court judged initially by state constitutional principle regarding prior restraint).

264. *See* Federal Bureau of Investigation, U.S. Dep't of Justice, 1986 Uniform Crime Reports: Crime in the United States 6-39 (1987)(discussion of percentage increase in specific crimes between 1985 and 1986). The study revealed that the total crime index rate for 1986 rose six percent from 1985, leading to the largest total number of offenses in the United States since 1981. *See id.* at 41. An earlier government study shows that, between 1984 and 1985, the total crime index rose over four percent. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, 1986 Sourcebook of Criminal Justice Statistics 259 (1987). The study shows the crime rate increase ranging from a low of two percent for

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the public conscience,[265] and appellate court reversal of well-publicized criminal convictions[266] have produced an adverse response to any effort that leans toward the protection of civil liberties. Accordingly,

> Where a Senator Bilbo or a Huey Long could once win office on racist slogans, a candidate today who promises to be 'tough on crime' is all but a shoo-in. As a result of this posturing, it is nearly impossible for the public to consider candidates' qualifications and genuine issues.[267]

1. California

Although much of this political posturing has resulted in questionable substantive laws[268] and dubious procedural laws,[269] the greater damage has been done to the idea of independent state judiciary. For example, in 1982, California voters approved a constitutional amendment known as the California Victims' Bill of Rights.[270] This constitutional amendment was clearly an effort "to harshen criminal penalties, to facilitate conviction and punishment, and to narrow the scope of rights enjoyed by criminal defendants."[271] The effort was

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murder and non-negligent manslaughter to a high of almost seven percent for motor vehicle theft. *See id.*

265. *See Letters to Hinckley Judge Criticize Acquittal*, N.Y. Times, Sept. 12, 1982, at 37, cols. 1-6. Federal District Judge Barrington D. Parker, who presided over John. W. Hinckley, Jr.'s trial for the attempted assassination of President Reagan, received over 1,500 letters of public outrage because the jury in that case found Hinckley not guilty by reason of insanity. *Id.* at 37, col. 1. Presiding Judge Onion of the Texas Court of Criminal Appeals received similar letters.

266. *See, e.g.*, Hanners, *Betty Lou Beets' Murder Conviction Set Aside*, Dallas Morning News, Nov. 13, 1987 § A, at 1, col. 1, 1, col. 1 (overturned conviction based on narrow definition of remuneration); Hight & Frink, *New Trial Ordered in '65 UT Slaying*, Austin American-Statesman, Jan. 28, 1987, § A, at 1, col. 1, 1, cols. 1-2 (new trial ordered because jury improperly considered issues of defendant's sanity and guilt together).

267. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 166, 173 (B. McGraw ed. 1985)(quoting Brown & Keane, *The New Vigilantes: The Right of the Accused to a Vigorous Defense Is Under Attack*, CAL. LAW. July 1983, at 11).

268. *See* 1987 Fla. Sess. Law. Serv. ch. 87-24 (West)(statute allowing "honest, law-abiding" citizens to qualify to carry concealed weapons for self-defense purposes).

269. *See* COLO. REV. STAT. § 18-1-704.5 (1986)(occupant of dwelling immune from civil and criminal liability for using force, including deadly force, against unlawful intruder in dwelling when occupant reasonably believes intruder will use any force against occupant, regardless of severity of force used by intruder).

270. CAL. CONST. art. I, § 28.

271. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE

successful on all fronts. The most disturbing aspect of the amendment is section 28(d), which sets forth the "right to truth-in-evidence."[272] According to this provision, with certain noted exceptions, and allowing for future statutory exceptions (if approved by "two-thirds vote of the membership in each house of the legislature"), all relevant evidence is admissible in a criminal prosecution.[273] Rather subtly, the amendment effectively removes from the California Supreme Court the authority to exclude evidence on the basis of a violation of a state constitutional right. In other words, evidence cannot be excluded unless there has been a concomitant violation of the federal Bill of Rights.[274]

The California Supreme Court did not, however, completely capitulate in the face of the amendment. In *People v. Cook*,[275] the California Supreme Court ruled that a warrantless police overflight of a defendant's fenced backyard, to determine if the defendant was growing marijuana, violated the state constitution's search and seizure provision.[276] Particularly significant was the California court's conclusion that section 28(d) was not retroactive in its application.[277] Thus, the court ruled that the evidence could constitutionally be suppressed.[278] More recently, in *People v. May*[279] the California Supreme Court gave life to that part of section 28(d) that exempts from mandatory admissibility "any existing statutory rule of evidence relating to privilege."[280] In doing so, the California court again re-

166, 171 (B. McGraw ed. 1985). The amendment's stated purpose is to effect "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons," with the goals of deterring criminal behavior and relieving some of the disruption in crime victims' lives. CAL. CONST. art. I, § 28(a). The article includes a victim's right to restitution from the convicted wrongdoer. *See id.* § 28(b).

272. CAL. CONST. art. I, § 28(d).

273. *Id.* At least one commentator has expressed concern that the "right to truth-in-evidence" provision has effectively created a "*per se* antiexclusionary rule." Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 166, 172 (B. McGraw ed. 1985).

274. *See id.* at 172.

275. 710 P.2d 299 (Cal. 1985).

276. *See id.* at 300.

277. *See id.* at 300 n.1; *see also*, People v. Smith, 667 P.2d 149, 151-52 (Cal. 1983)(en banc)("truth-in-evidence" proposition effective only for crimes committed after June 9, 1982).

278. *See Cook*, 710 P.2d at 308 (excluding evidence obtained in warrantless search of defendant's back yard by flying overhead in airplane).

279. 729 P.2d 778 (Cal. 1987)(en banc).

280. *See id.* at 783-84 (discussing significance of evidentiary privileges).

jected the United States Supreme Court's holding in *Harris v. New York*[281] and concluded that, under the California Constitution, a defendant's statements given in violation of *Miranda* cannot be used to impeach that defendant.[282]

2. Florida

The people of Florida were much more blunt in relinquishing their state-created rights to the United States Supreme Court. In 1968, Florida voters approved a new constitution that expressly incorporated a state judicially created exclusionary rule.[283] Eleven years later, the Florida Supreme Court, in *Grubbs v. State*,[284] decided that the constitutionally-based exclusionary rule was more restrictive of state power than that required by the federal fourth amendment.[285] However, a small dent was put in the armor of Florida's rather minimal exercise of new federalism as a result of the Florida court's holding in *State v. Sarmiento*.[286] In *Sarmiento*, the court decided that, under the Florida Constitution, a warrant was required when an undercover agent was secretly recording or transmitting conversations in a defendant's home.[287] The court acknowledged that this requirement accorded a greater right than a citizen of Florida would be entitled to receive under the federal fourth amendment.[288]

In response to the Florida Supreme Court's effort to exercise its independence and protect its citizens from what that court perceived to be intrusive police conduct, the citizens of Florida insisted that any state-created protections against unreasonable searches and seizures

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281. 401 U.S. 222, 225 (1971)(statement obtained in violation of *Miranda* may be used for impeachment).

282. *See May*, 729 P.2d at 793.

283. *See* FLA. CONST. art. 1, § 12 (1968, amended 1982)(evidence obtained in violation of Florida search and seizure law inadmissible as evidence).

284. 373 So. 2d 905 (Fla. 1979).

285. *See id.* at 909 (evidence must be obtained properly or reasonably).

286. 397 So. 2d 543 (Fla. 1981)(per curiam).

287. *See id.* at 644 (warrantless recording of conversations in private home unreasonable under Florida constitution).

288. *See id.* at 645. The dissent, through Justice Alderman, argued that the warrantless recording of the defendant's conversations with an undercover police officer, which took place in the defendant's home, were valid due to the interpretation given the federal fourth amendment by the United States Supreme Court. *See id.* at 646 (Alderman, J., dissenting)(citing United States v. White, 401 U.S. 745 (1971)). The majority, however, expressly discounted this proposition by recognizing that Florida could legitimately provide greater constitutional protection to its citizens than the federal fourth amendment. *See id.* at 645.

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were to be interpreted in accordance with standards set by the United States Supreme Court. In 1982, an amendment to the search and seizure clause of the Florida Constitution was passed.[289] The amendment stated: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."[290] The Florida Supreme Court's only reaction so far has been limited. As in the California Supreme Court's decision in *People v. Cook*,[291] the Florida Supreme Court in *State v. Lavazzoli*[292] ruled that the amendment could not be applied retroactively.[293] Very recently, in *State v. Hume*,[294] the proponents of the new constitutional amendment achieved further success when the Florida Supreme Court overruled *Sarmiento* and recognized as controlling *United States v. White*.[295] The abolition of a state-guaranteed and state-interpreted protection against unreasonable searches and seizures was complete.

B. *The Problem of Procedural Default*

As a practical matter, procedural default to a great extent renders such state constitutional amendments unnecessary. The procedural default occurs because many attorneys fail to timely and properly claim their state constitutional rights, and rely solely upon equivalent federal rights.[296] This is unforgivable but understandable when one recognizes the low esteem in which state-protected rights have been held historically.[297] For too many years, if a defendant had pled and

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289. FLA. CONST. art. 1, § 12.

290. *Id.* The amendment further provided that, regarding the admissibility of evidence obtained in violation of that provision, the Florida courts were to follow "decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." *Id.*

291. 710 P.2d 299, 301 n.1 (Cal. 1985)(exclusionary rule created by Proposition Eight amendment not applicable to crimes committed before June 8, 1982).

292. 434 So. 2d 321 (Fla. 1983).

293. *See id.* at 323 (amendment applies prospectively absent "clear legislative expression to the contrary").

294. 512 So. 2d 185 (Fla. 1987).

295. *See id.* at 188. The court expressly adopted the reasoning of *White* that it was a legitimate and reasonable investigative technique for an undercover police officer to simultaneously record or transmit a conversation with an accused, even in the absence of a warrant authorizing such action. *See id.* at 187-88 (citing United States v. White, 401 U.S. 745 (1971)).

296. *See infra* text accompanying note 297-302.

297. *See generally* Collins, *Reliance on State Constitutions: Some Random Thoughts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 1, 5-6 (B. McGraw ed. 1985)(bemoaning dearth of reliance on state law by judiciary, practicing

argued only state constitutional rights, his claim would have been viewed by the state courts as an anomaly. However, with "new federalism" emerging almost in converse proportion to the United States Supreme Court's restriction of individual liberties, the pleading of state based constitutional rights is becoming almost synonymous with effective representation. In *State v. Lowry*,[298] for example, in a concurring opinion Justice Jones made the following rather harsh comment: "Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice."[299] As one commentator has stated: "The single most important contribution that can be made to revitalize state law is to institute a practice whereby the invocation of state law is the rule rather than the exception in all cases, especially those touching individual rights."[300]

It is frustrating when an appellate court judge, examining an arguably viable claim, discovers that the claim was not properly preserved under the state constitution and that the federal Constitution has limited or no applicability. In most states, and surely in Texas, if one intends to raise on appeal a right secured by the state constitution, then the claim most often must be asserted at the trial level and properly pursued.[301] Otherwise, the appellate courts will presume that the defendant waived the right.[302] Therefore, until questions concerning state constitutional rights are properly preserved and presented in the

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attorneys, commentators, and academicians). Unfortunately, at the present time, the University of Texas School of Law is the only Texas law school to offer a course on the Texas Bill of Rights.

298. 667 P.2d 996 (Or. 1983).

299. *Id.* at 1013 (Jones, J., concurring).

300. Collins, *Reliance on State Constitutions: Some Random Thoughts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 1, 7 (B. McGraw ed. 1985).

301. *See, e.g.*, Russell v. State, 665 S.W.2d 771, 777 (Tex. Crim. App. 1983)(even constitutional right waived by failure to object at trial), *cert. denied*, 465 U.S. 1073 (1984); Hovila v. State, 562 S.W.2d 243, 247 (Tex. Crim. App. 1978)(en banc)(appellate court cannot consider argument not complained of at trial); Mendoza v. State, 552 S.W.2d 444, 450 (Tex. Crim. App. 1977)(error not preserved without objection at trial); *see also* TEX. R. CIV. P. 90 (pleading defects waived if not brought to attention of trial judge); TEX. R. CIV. EVID. 103 (court ruling on admissibility of evidence not predicate for error absent trial objection); TEX. R. APP. P. 52 (complaint preserved for appellate review only by timely objection at trial).

302. *See* White v. State, 543 S.W.2d 366, 369-70 (Tex. Crim. App. 1976)(citing several cases holding grounds for reversal urged on appeal must relate to trial objections).

state appellate courts, there is no available method to review an issue on state constitutional grounds. It is obvious that an attorney should not only claim the state constitutional right during the trial, but he should also brief the issue separately in the appeal. State constitutional rights should not be viewed as the tail on the body of an equivalent federal constitutional right.

C. Relying on State Constitutional Provisions on Remand from the United States Supreme Court

1. State Court Response to Supreme Court Mandates

State supreme courts have rebelled against the United States Supreme Court's limitations on individual rights and liberties. For example, the United States Supreme Court claimed victory in the battle with the South Dakota Supreme Court over the search and seizure issue in *South Dakota v. Opperman*,[303] and reversed and remanded the case.[304] On remand, the state supreme court again held that the inventory procedure in the case at bar was an unreasonable search under article VI, section 11 of the South Dakota Constitution.[305] This time, however, the South Dakota court unambiguously stated:

> This court is the final authority on interpretation and enforcement of the South Dakota Constitution. We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution.[306]

Approximately eight years later, the United States Supreme Court again confronted the South Dakota Supreme Court on the battlefield and again lost the war. In *South Dakota v. Neville*,[307] the United States Supreme Court held that a defendant's refusal to take a blood test may be used in evidence without violating the defendant's fifth amendment privilege against self-incrimination.[308] This was contrary to *State v. Neville*,[309] wherein the South Dakota Supreme Court had held that the admission of such evidence was a violation of the fifth

303. 428 U.S. 364 (1976), *reversing* State v. Opperman, 228 N.W.2d 152 (S.D. 1975).
304. *See id.* at 376.
305. *See* State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976).
306. *Id.* at 674.
307. 459 U.S. 553 (1983).
308. *See id.* at 564.
309. 312 N.W.2d 723 (S.D. 1981), *rev'd sub nom.* South Dakota v. Neville, 459 U.S. 553 (1983).

amendment.[310] Upon remand, the South Dakota Supreme Court, taking a rather confrontational stance and citing *State v. Opperman*,[311] found that such evidence violated the self-incrimination clause of the South Dakota Constitution and again suppressed the evidence."[312]

2. Supreme Court's Refusal to Remand

Apparently frustrated by the rebellious conduct of state supreme courts and their assertions of independence, the United States Supreme Court in *Illinois v. Gates*[313] reversed the Illinois Supreme Court but did not remand the case.[314] Following such an unusual disposition, the respondent's attorney moved for a rehearing and correction of the judgment.[315] Respondent argued, and quite properly, that the United States Supreme Court's opinion failed to recognize that the Illinois Supreme Court's decision suppressing the evidence was based upon the probable cause requirements of the Illinois Constitution as well as upon the federal fourth amendment.[316] The petition for rehearing was denied.[317]

Professor William Greenhalgh recounts the later events:

> The Gates' counsel was not satisfied, however, and next petitioned the Illinois Supreme Court for rehearing and clarification as to the state or federal basis of that court's opinion. His petition for rehearing was again denied. Finally, a mandate apparently was passed through the Illinois Appellate Court as if, in the words of respondents' counsel, there was a 'tunnel from Washington to Wheaton,' where the Dupage County Circuit Court sits. After Gates' counsel unsuccessfully argued Illinois law as a basis for a Motion to Suppress, the *Gates* case finally ended. On October 9, 1984, Lance and Susan Gates entered pleas of

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310. *See id.* at 726. In dicta, the court found that no distinction needed to be made between the fifth amendment of the United States Constitution and South Dakota's constitutional provision. *Id.* at 726 n.*.

311. *See* State v. Neville, 346 N.W.2d 425, 427 (S.D. 1984)(citing State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

312. *See id.* at 431 (refusal to submit to blood test inadmissable).

313. 462 U.S. 213 (1983).

314. *See id.* at 246 (court simply reversed Illinois Supreme Court).

315. *See* Greenhalgh, *Independent and Adequate State Grounds: The Long and the Short of It*, in DEVELOPMENTS IN STATE CONSTITUTION LAW: THE WILLIAMSBURG CONFERENCE 211, 219 & n.60 (B. McGraw ed. 1985)(citing Petition for Rehearing and Correction of Judgment, Illinois v. Gates, 462 U.S. 213 (1983)(No. 81-430)).

316. *Id.* at 219 & nn.60-61 (citing Petition for Rehearing and Correction of Judgment at 3, Illinois v. Gates, 462 U.S. 213 (1983)(No. 81-430)).

317. Illinois v. Gates, 463 U.S. 1237 (1983).

guilty of possession of marijuana and were sentenced as follows. Susan Gates received a sentence for four years probation with a condition that she devote six months to a community service program. Lance Gates received four years probation with a condition that he spend thirty days out of each of those years in a county jail. No fine was imposed in either case.[318]

During its 1986-1987 term, the United States Supreme Court decided a number of cases that recognized overlapping claims of both state and federal constitutional violations. Although the substantive holdings of these cases are obviously significant, even more so, at least for this article, is the inconsistent disposition the Court made of the cases. For example, in *Colorado v. Connelly*,[319] the Court reversed the judgment of the Colorado Supreme Court and remanded.[320] However, less than one month later, in *Colorado v. Bertine*,[321] the Court reversed the Colorado Supreme Court but did not remand the case.[322] Less than two weeks later, in *Colorado v. Spring*[323] the Court reversed the Colorado Supreme Court and remanded.[324] Throughout its term, the Court's only consistency in its disposition of cases was, paradoxically, its inconsistency.

3. Effect of Reversing Without Remanding

The refusal of the United States Supreme Court to remand a case to the state court may have a significant effect upon the writing of state court opinions. As previously discussed, *Michigan v. Long*[325] seemingly provides state courts with a means to avoid Supreme Court review.[326] At least one state judge has equated the *Long* disclaimer with

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318. Greenhalgh, *Independent and Adequate State Grounds: The Long and the Short of It*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 211, 219 (B. McGraw ed. 1985).

319. __ U.S. __, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

320. *See id.* at __, 107 S. Ct. at 524, 93 L.Ed. 2d at 487 (confession of mentally disoriented man upheld).

321. __ U.S. __, 107 S. Ct. 738, 93 L.Ed. 2d 739 (1987).

322. *See id.* at __, 107 S. Ct. at 743, 93 L. Ed. at 748 (good faith inventory search upheld).

323. __ U.S. __, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987).

324. *See id.* at __, 107 S. Ct. at 968, 93 L. Ed. 2d at 859 (suspect's advance knowledge of possible subjects of questioning not required under fifth amendment).

325. 463 U.S. 1032 (1983).

326. *See id.* at 1041 (if state court opinion clearly and expressly indicates that it was based on "bonafide separate, adequate, and independent grounds," Supreme Court will not review decision); *see also supra* text accompanying notes 208-12.

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a *Miranda* warnings card carried by police officers, and commented that "[i]t may be advisable for the states to adopt a similar form declaration to satisfy the plain statement requirement of *Michigan v. Long*. Perhaps every state Supreme Court Justice should have in his desk drawer a *Miranda*-type printed card, readily adaptable to an opinion" that comports with the disclaimer language in *Long*.[327]

In addition, the refusal of the Supreme Court to remand a case wherein the state court based its decision upon both state and federal consitutional grounds has the potential of procedurally disrupting the criminal justice system. For example, presume the following: a state supreme court decides a case on state and federal constitutional grounds in favor of the defendant; upon appeal to the United States Supreme Court, the State prevails on the Supreme Court's interpretation of the federal constitutional claim; rather than reverse and remand, the Supreme Court merely reverses the state court, thereby affirming the defendant's conviction from the trial court. Without a remand, further state court review would be foreclosed. Consequently, when faced with such inconsistent dispositions and the possibility that further state review will be eliminated, state court appellate judges will be more inclined to include within their opinions a disclaimer to foreclose the possibility of a reversal without a remand.

However, it is possible that further state court review would not necessarily be completely foreclosed. Assuming the above facts, the appropriate recourse for the incarcerated defendant, at least in Texas, would be to pursue a post-conviction writ of habeas corpus.[328] Remember, the United States Supreme Court has no jurisdiction whatsoever to disturb a state court's interpretation of the state constitutional claim; the United States Supreme Court may only resolve federal constitutional rights.[329] Thus, the Supreme Court cannot disturb that portion of the state's decision that rests exclusively on state constitutional grounds. If the state court judgment and mandate is final, then it is arguable that the defendant is being unlawfully restrained in violation of the state court decision. Therefore, even if there is no remand, further state appellate review may not be foreclosed.

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327. Mosk, *State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 201, 207 (B. McGraw ed. 1985). Stanley Mosk is a Justice on the California Supreme Court.

328. *See* TEX. CODE CRIM. PRO. ANN. art 11.07 (Vernon 1977 & Supp. 1988)(procedure for post-conviction writ).

329. *See supra* text accompanying notes 83-86, 208-12.

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V. Conclusion

It has been repeatedly and accurately stated that the United States Supreme Court merely sets the minimum standards with which the states must comply. Accordingly, it is the individual states' prerogative to construe their state constitutional rights more expansively than the Supreme Court interprets analogous federal constitutional rights. Since this logically invokes the principle of state sovereignty, it necessarily follows that state courts must assume the responsibility of independently determining whether the state constitution grants its citizens greater rights than those afforded by the federal Constitution.

In *Griffin v. Wisconsin*,[330] the United States Supreme Court concluded that a state regulation permitting probation officers to conduct searches of probationers' homes without warrants and upon "reasonable grounds," rather than upon probable cause, did not violate the fourth amendment.[331] This case is diametrically opposed to the Texas Court of Criminal Appeals decision in *Tamez v. State*,[332] wherein the court held that "[i]t is clear that protection afforded by the Fourth Amendment and Article I, Sec. 9, Texas Constitution, extends to probationers."[333] In *Brown v. State*,[334] a plurality of the Texas Court of Criminal Appeals stated: "We . . . decline [the defendant's] invitation to attach to Article I, Section 9 of our Texas Constitution a more restrictive standard of protection than that provided by the Fourth Amendment."[335] It will be interesting to see whether the Texas Court of Criminal Appeals, when it confronts these competing interests and conflicting cases, continues to march lock-step with the United States Supreme Court and thus duplicate rather than originate; or, conversely, to accept its responsibility and independently judge the protections afforded its citizens under article I, section 9, of the Texas Constitution.

The adoption of the concept and practice associated with "new federalism" is not to disparage the necessity of a federal rule of law. The revival and continuing emergence of state constitutional law is not a panacea for all constitutional illnesses. On the contrary, a federal rule

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330. __ U.S. __, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).
331. *See id.* at __, 107 S. Ct. at 3171, 97 L. Ed. 2d at 722.
332. 534 S.W. 2d 686 (Tex. Crim App. 1976).
333. *Id.* at 692.
334. 657 S.W.2d 797 (Tex. Crim. App. 1983).
335. *Id.* at 798.

of law is indispensable simply because it is applicable to all the states. But, this federal rule of law must remain the minimum. State sovereignty is no less vital to our system of government today than it was in 1789. Without a strong, effective and reliable state judiciary, the idea of separate, independent states becomes a fiction.