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State Constitutionalism in Practice

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STATE CONSTITUTIONALISM IN PRACTICE

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A Review of *Intellect and Craft: The Contributions of Justice Hans Linde to American Constitutionalism*, edited by Robert F. Nagel.[1] Boulder: Westville Press, 1995. Pp. xi + 318, $56.00.

I. INTRODUCTION

In an era which threatens to flood us with words about the law, full of dense theory and reiteration of doctrines and minor variations on well worn themes as if some legal sorcerer's apprentice were out of control, the clarity and originality of Justice Hans Linde's scholarly and judicial writings loom like an island in a swamp. Over the span of his career as a law professor at the University of Oregon (1959-1976), his tenure as a Justice of the Oregon Supreme Court (1976-1989), and more recently as an itinerant academic reborn, Justice Linde's contributions have not been wanting. He has contributed more than his share to the body of legal literature; indeed, author of more than fifty articles and published lectures,[2] and of more than 350 judicial opinions, Linde ranks among the most prolific of legal scholars and judges. His work, both as a scholar and as a judge, bears always the stamp of a truly original thinker and, whether one agrees with him or not, what Justice Linde has to say is consistently provocative and insightful.

It is a most valuable service, therefore, that Professor Robert Nagel has performed by bringing us, in a single volume, excerpts from seven of Justice Linde's articles and from thirteen of his opinions, together with brief but useful introductions by Professor Nagel, himself a scholar of note. The excerpts are, of necessity, highly selective. Limited to the area of constitutional law, or at

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* Distinguished Professor of Law, University of California, Hastings College of the Law. Former Associate Justice, California Supreme Court. J.D., Yale Law School; Ph.D., London School of Economics. The author wishes to make two disclosures of interest: (1) he was the author of one of the California Supreme Court opinions referred to in this article (*see infra* note 100); (2) he was the author of an amicus curiae brief to the California Supreme Court in American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. 1994), in which he argued, on behalf of himself and other constitutional law scholars, in favor of an independent interpretation of the California Constitution.

1. INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995) [hereinafter INTELLECT AND CRAFT].

2. For a bibliography of Justice Linde's works, see *Symposium on the Work of Justice Hans Linde in* 70 OR. L. REV. 679 (1991).

least public law, they naturally omit Justice Linde's other important contributions, for example, his writings and opinions on the law of torts. Even within the constitutional law arena, the pattern of Nagel's selections, as well as his commentary, appear to reflect something of his own predilections.[3] There is a good deal of emphasis, for example, on those parts of Linde's writings which are critical of certain aspects of judicial review. Nonetheless, the excerpts do contain a representative sampling of the themes which are reflected in Linde's writings generally, and they provide an unusual opportunity to compare what a thoughtful person writes as a scholar with what he writes from the bench. While some scholars-turned-jurists might not welcome that comparison, in Linde's case it turns out there is little to fear.

Labels are tempting but often misleading and this is particularly likely to be the case with someone of Justice Linde's caliber and originality. In a number of respects, Linde has been highly critical over the years of the opinions of the United States Supreme Court. In Linde's view, primary responsibility for applying the prescriptions of the federal Constitution lies with the legislative and executive branches, and while the Supreme Court is empowered to pass ultimately on constitutional issues, it should do so in a way that provides meaningful guidance to the other branches rather than in terms of directives to the lower courts.[4] In that vein, Linde deplores constitutional doctrine phrased in terms of "fundamental rights," "strict scrutiny," "balancing," and the like. He does not approve of the Court's willingness to find rights, such as the right of privacy, implicit in the Constitution (writing for the Oregon Supreme Court, he complained that "no one has ever been able to furnish a principled constitutional explanation of the supposed right"),[5] and for that matter he has written in opposition even to the limited review for "rationality" that the Court finds implicit in the due process principle at the lowest level of scrutiny. Rather, Linde asserts that the Due Process Clause, insofar as it applies to legislation, should have as its focus the process of lawmaking rather than its results.[6] Linde, as a scholar, preaches judicial restraint in the sense of avoiding

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3. Robert Nagel has characterized himself as having a "generally skeptical orientation on judicial review." Robert F. Nagel, *Name Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193 (1993). That is probably a fair characterization. For example, see Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984).

4. "Turning the logic of judicial review right side up implies, I suggest, a principle that a judge-made rule of constitutional law must articulate criteria with which a government conscientious about its constitutional duties could know how to comply . . . even without judicial review." Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) [hereinafter *Realist Tradition*], *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 39.

5. Sterling v. Cupp, 625 P.2d 123 (Or. 1981), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 213 n.2 (quoting Sterling v. Cupp, 607 P.2d 206, 209 (Or. Ct. App. 1980) (Joseph, J., dissenting)).

6. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

the resolution of constitutional issues if at all possible, and as a jurist, has practiced what he preached, preferring to reinterpret potential constitutional issues into issues of statutory interpretation[7] or administrative authority.[8] Finally, Linde insists as both scholar[9] and judge that courts should avoid using the language of legal realism that refers to the social consequences of their decisions. Like Ronald Dworkin, Linde believes that principle, not policy, is the proper province of the courts.[10]

All of this might tempt one to characterize Linde as "conservative," and a proponent of "judicial restraint" as those terms are used in modern legal parlance, but one should be cautious in this characterization. Linde sees a major role for courts in the enforcement of federal and state constitutional provisions which have to do with governmental structure and the allocation of authority.[11] Furthermore, Linde is quite willing for courts to exercise extensive judicial review in other areas, so long as it is premised upon plausibly supportive constitutional language. In the area of free speech for example, Linde is, in certain respects, an absolutist. As a scholar, he argued that the First Amendment should be read as prohibiting any law phrased in terms of speech,[12] and as a justice he followed that prescription, leading the Oregon Supreme Court to invalidate, based on the Oregon Constitution, an ordinance which prohibited "adult businesses" from locating in particular areas. The Oregon Supreme Court reasoned that the term "adult businesses" was defined based upon the content of the material they communicated.[13] The opinion's authors rejected the United States Supreme Court's First Amendment rationale as expressed in *Renton v. Playtime Theatres, Inc.*[14] that such a law should be upheld because it aimed at the "effects" of speech rather than at the speech itself.

Linde's post-retirement writings reflect what some might characterize (though Linde would surely not) as quite an activist position with regard to the

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7. *See, e.g.*, Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986), *appeal dismissed*, 480 U.S. 942 (1987), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 139.

8. *See, e.g.*, Ross v. Springfield Sch. Dist. No. 19, 716 P.2d 724 (Or. 1986), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 152-53 (insisting that a school board which found a teacher's sexual conduct to be "immoral" articulate the basis for that finding).

9. *See Realist Tradition*, *supra* note 4, at 33.

10. *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

11. Hans A. Linde, *"A Republic . . . If You Can Keep It,"* 16 HASTINGS CONST. L.Q. 295 (1989), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 103.

12. Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171 (1981), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 43.

13. City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988) (en banc), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 161.

14. 475 U.S. 41 (1986).

initiative process. A strong believer in representative government, Linde views "direct democracy" with suspicion, primarily because it permits the majority to impose its will of the moment without the checks and balances that are a part of the legislative process. He would not outlaw use of the initiative altogether, but does advocate reliance on the Guaranty Clause of the federal Constitution, guaranteeing to each state a "Republican Form of Government," as a basis for striking down (or keeping off the ballot) certain initiative measures which, in his view, contravene the principles of representative government which the clause was designed to protect.[15] Relying upon Madisonian language to the effect that one of the functions of representative democracy is to prevent majorities from enacting laws out of "interest" or "passion," Linde's proposed criteria for identifying ballot measures which offend that principle are phrased in broad terms which necessarily call for the exercise of loosely constrained discretion.[16]

In the case of state constitutions, Justice Linde has been willing to support judicial invalidation of legislative or administrative action on the basis of broadly phrased provisions under circumstances which might also give pause to justices less creative in their approach to the law. For example, Linde led the Oregon Supreme Court to conclude that searches made by female prison guards deprived the male prisoners of the right not to be punished with "unnecessary vigor,"[17] while rejecting the male prisoners' argument that such a search infringed upon their constitutional right of privacy. And, in a post-retirement article criticizing state courts for following blindly in the doctrinal steps of the United States

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15. Linde first advanced this thesis in Hans A. Linde, *When is Initiative Lawmaking Not 'Republican Government,'* 17 HASTINGS CONST. L.Q. 159 (1989). Recognizing that the United States Supreme Court regards issues under the Guaranty Clause as non-justiciable, Linde believes that view does not constrain state courts. *Id.* at 161. Linde expanded upon his thesis, in the context of the Oregon initiative campaign aimed at homosexuals in Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) [hereinafter *Republican Government*], *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 125.

16. Linde would include within the categories of offensive measures not only those which on their face refer to particular groups "in pejorative or stigmatizing terms," or which are "by their terms directed against identifiable racial, ethnic, linguistic, religious, or other social groups"—criteria which would capture, for example, measures aimed at homosexuals, but also measures which are "proposed in a historical and political context in which the responsible state officials and judges have no doubt that the initiative asks voters to choose sides for and against such an identifiable group and that it is so understood by the public," as well as those "which appeal to majority emotions to impose values that offend the conscience of other groups in the community without being directed against those groups." *See Republican Government, supra* note 15, at 133-34. This last category, Linde suggests, would include "[p]roposals to suppress teaching about evolution, to replace school prayers with minutes of silence, to enact a death penalty, and perhaps also Prohibition, abortion laws, and similarly ideological measures that sometimes sweep the country . . . ." *Id.* Justice Scalia would not likely approve.

17. Sterling v. Cupp, 625 P.2d 123 (Or. 1981), *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 211.

Supreme Court, Linde suggested that a statute limiting funding for abortions could be addressed under a state constitutional provision guaranteeing the right to "safety and happiness."[18] These are not the views of one who invariably seeks ways to constrain the judicial role.

It is in the area of state constitutionalism that Linde has made his most notable contribution to modern American jurisprudence, and while Nagel's book is commendable in other respects, it fails to do Linde's contribution adequate justice. The only law review excerpt on Linde's ideas is from his piece entitled *Are State Constitutions Common Law?*,[19] and the focus is on Linde's critique of state courts for following slavishly what Linde regards as flawed federal constitutional doctrine instead of developing their own. The critique is important, but it reflects a rather narrow aspect of Linde's overall thesis.

II. JUSTICE LINDE AND STATE CONSTITUTIONALISM

The most definitive presentation of Linde's views on state constitutionalism remains his 1980 article, *First Things First: Rediscovering the States' Bills of Rights*.[20] Justice William Brennan, Jr., in his famous *Harvard Law Review* article,[21] had already urged state courts to consider their own constitutions in passing upon claims of right, but he did so on grounds that to Linde must have seemed overly pragmatic. It was important, in Justice Brennan's view, for state courts to fill in the gap that was in the process of being created by his colleagues' ongoing retrenchment in the protection of rights under the federal Constitution. Linde's argument, by contrast, is historical and analytical. The provisions of state constitutions protective of individual rights are not mere replications of the federal Bill of Rights; rather they precede, or (in the case of more recent state constitutions) are based upon state constitutional provisions which precede, and form the basis for, the first ten amendments. Moreover, and perhaps more significantly, just as generally accepted principles of judicial restraint dictate that a court should not decide a constitutional issue if the matter can be resolved through statutory interpretation, so a court should not consider

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18. Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992) [hereinafter *State Constitutions*], *reprinted in* INTELLECT AND CRAFT, *supra* note 1, at 91. Linde is not necessarily advocating such an analysis or result, but rather considers it preferable to the analysis used by the United States Supreme Court to deal with abortion questions.

19. *See generally id.*

20. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). For earlier statements of the thesis, see Hans A. Linde, *Without "Due" Process in Oregon*, 49 OR. L. REV. 125, 133-35 (1970); Hans A. Linde, Book Review, 52 OR. L. REV. 325, 332-41 (1973) (reviewing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971)).

21. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

a federal constitutional claim if the matter can be disposed of under the state's own constitution. The Fourteenth Amendment prohibits a state from denying its citizens certain rights; if state law, including the state's constitution, respects the right being asserted, an analysis of the claim under the federal Constitution is unnecessary and inappropriate. Linde makes clear that state courts should consider their own constitutions first, not because of any substantial retrenchment occurring at the federal level, but because this consideration is legally correct. These principles have gained acceptance over the last fifteen years to the point where consideration of independent state grounds has become commonplace in probably most state courts. It is not uncommon for federal courts to rest their decisions on state constitutional grounds when available,[22] and both lawyers and law students are coming to appreciate the importance of asserting state constitutional arguments.[23]

It is also true that many courts are inconsistent in their approach, in some cases confronting state constitutional issues first, in other cases ignoring them in favor of decisions on federal constitutional grounds, and in still other cases conflating federal and state constitutional analyses so that it becomes difficult to determine the true ground for the decision.[24] Writing as a former state supreme court justice (and one who, I might add, was sometimes guilty of such offenses), I can attest that there are a number of explanations for this phenomenon, depending both on the case and on the court.[25] One explanation is that the lawyers in a particular case fail to raise state constitutional issues, and the court either ignores the possibility to invite briefing on those issues or for some reason does not consider it appropriate to do so. A second reason is that the jurisprudence in a particular area may have been so well-developed under the federal Constitution, and so weakly developed under the state constitution, that the court simply finds it easier to decide the case on federal constitutional grounds than to try to develop an independent state analysis. Finally, a state court may prefer to insulate itself from criticism over what it predicts will be an unpopular decision by fixing responsibility upon the Court in Washington. None of these explanations constitute principled justification for ignoring Linde's first-things-first prescription, however, if there is a principled rebuttal to that prescription, I have yet to discover it.

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22. *E.g.*, Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985).

23. For an excellent casebook in the field, see ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed. 1993).

24. *See* Michigan v. Long, 463 U.S. 1032 (1983) (establishing a presumption that a state court decided a constitutional case on federal grounds unless an independent state ground is clearly stated).

25. I have confessed my sins and acknowledged my debt to Linde in JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE (1989).

In subsequent articles, Linde has gone on to address a further, analytically distinct question, which is how a state court should go about deciding a state constitutional issue it has determined to confront.[26] There are really two issues here. One issue is the specific, and for some courts, threshold issue as to what role federal Supreme Court constitutional decisions should play in the state court's analysis. Thus, the issue becomes whether the Supreme Court's decision is entitled to some sort of "deference" even though the Court is construing a different document pertaining to a different polity, or whether the state court should feel free to pursue an independent course. The second related issue is how the state court should analyze the state constitutional issue, that is, whether it should analyze a case in terms of the doctrine that the United States Supreme Court has developed for analysis of the cognate federal constitutional issue, or whether it should develop its own, possibly improved, doctrine.

Linde's view as to the first question is that a state court should approach its state constitution as a truly independent document—that it should not only refrain from following "lockstep" in the path trod by the United States Supreme Court, but that it need not and should not insist upon a showing of some special "justification" for departing from that path. State constitutions often contain different language than the federal Constitution for describing constitutional rights and state courts are often in a position to rely upon distinctive history or doctrine, or political culture. However, none of these reasons are necessary to depart from federal precedent, since no excuse is required. State constitutional law is not common law to be molded into a homogenous body of principles. United States Supreme Court opinions may prove as valuable as opinions of other state courts, or of academic commentators, with respect to the analysis of certain issues, but they are entitled to no greater weight.

Linde also has ideas when it comes to how state courts should go about the task of giving meaning to their state constitutions, once they have accepted their own autonomy. Not surprisingly, those ideas represent the flip-side of the critique which he has waged against certain opinions of the United States Supreme Court. Linde believes that state courts should think independently about constitutional doctrine, and not accept unthinkingly, for example, the Supreme Court's views about substantive due process, levels of equal protection analysis, implied fundamental rights, and the like. He believes state courts should eschew instrumentalist reasoning, attend to institutional considerations, and seek to legitimize by grounding their decisions in constitutional analysis rather than in "extra-constitutional" considerations. In other words, state courts

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26. In addition to his article *Are State Constitutions Common Law?, supra* note 18, Linde published *E Pluribus - Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). *E Pluribus* was based upon his John A. Sibley Lecture in Law delivered at the University of Georgia School of Law on October 18, 1983.

should refrain from making the same "mistakes" the United States Supreme Court has made. Linde advances here his own views about constitutional doctrine and theory. But one need not embrace Linde's substance in order to agree with the logic of his call for true state constitutional independence, both with regard to the priority of decision making and the limited relevance of United States Supreme Court opinions.

Yet, the principle of truly independent state constitutionalism, while gaining in acceptance, still meets with strong resistance. Some courts and commentators advocate, if not strict conformity to federal decisions in certain areas,[27] then at least deference sufficient to require articulated justification for departing from federal decisions—some difference in the state constitution's text, history, or context which explains why the state constitution affords greater protection to particular rights than the federal Constitution.[28] For some, the deferential posture seems more intuitive than intellectual; the High Court is, after all, the high court, since it has greater experience with constitutional issues, and state constitutions are not really meant to provide greater protection anyway. For others, deference is appropriate when there are no differences among states with regard to fundamental values or character that would support reasoned constitutional discourse,[29] or because state constitutionalism is but a "device for advancing the liberal political agenda,"[30] or because uniformity is desirable in order to provide predictability in certain types of cases,[31] or as a means of maintaining public confidence in a coherent body of fundamental rights.[32]

Much has been written in response to these criticisms, mostly of a theoretical nature, and there is no need to recapitulate it here.[33] It might be

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27. For examples of the lockstep approach, see *infra* notes 96-97 and accompanying text.

28. *See, e.g.*, A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 936 (1976); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitutions*, 29 STAN. L. REV. 297, 313 (1977).

29. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); *cf.* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (arguing in favor of state constitutionalism on the basis that it reflects a diversity of interpretive bodies, all engaged in a common enterprise).

30. Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233 (1989).

31. *E.g.*, State v. Florance, 527 P.2d 1202 (Or. 1974) (declining to depart from federal search and seizure principles on grounds that law enforcement officials need clear and uniform guidelines).

32. *See* Johansen, *supra* note 28, at 316-21.

33. Among the more influential pieces (in addition to those by Justice Linde) are: Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991); Daniel Gordon, *Superconstitutions Saving the Shunned: The State Constitution Masquerading as Weaklings*, 67 TEMP. L. REV. 965 (1994); Judith S. Kaye, *State Courts at the Dawn of New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995); Burt Neuborne, *A Brief Response to Failed Discourse*, 24 RUTGERS L.J. 971 (1993);

useful, however, to look at the practice of state constitutionalism in a particular area, one that has produced examples of both conformity and non-conformity with the controlling United States Supreme Court opinion, and see what observations might be made.

III. STATE CONSTITUTIONALISM IN PRACTICE

The cases to be analyzed here reflect a remarkably common recurring fact pattern. The police have a suspect in custody and are interrogating or are about to interrogate him, after warning him of his constitutional right to remain silent and advising him of his right to be represented by an attorney. An attorney appears or calls and informs the police that a friend or relative of the suspect has retained him to represent the suspect and that he wishes to talk with the subject before the police question him any further. Nevertheless, the police proceed with the interrogation, without notifying the suspect of the imminent availability of counsel, and obtain a confession which is then offered into evidence at trial. The question is whether the confession should be accepted or excluded. In *Moran v. Burbine*,[34] the United States Supreme Court addressed the issue for the first time and held that the federal Constitution provided no bar to admission of such a confession.[35] Both before and after *Burbine*, nearly twenty state courts addressed the issue. The pattern of their decisions is worth examining.

A. *Pre-Burbine*

Prior to the United States Supreme Court's decision in *Burbine*, about a dozen state courts had considered the question and decided that the post-notification evidence should be excluded.[36] The first court was the New York Court of Appeals, which, in a line of cases beginning with *People v. DiBiasi*,[37] had developed the rule that once an attorney enters the proceeding the police may not question the defendant further unless there is an affirmative waiver

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David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984). For an excellent compendium of excerpts from some of these and other articles, see WILLIAMS, *supra* note 23, at 297-364.

34. Moran v. Burbine, 475 U.S. 412 (1986).

35. *Id.* at 434.

36. People v. Somerville, 703 P.2d 615 (Colo. Ct. App. 1985); Weber v. State, 457 A.2d 674 (Del. 1983); Haliburton v. State, 475 So. 2d 192 (Fla. 1985); Davis v. State, 287 So. 2d 399 (Fla. Dist. Ct. App. 1973); People v. Smith, 442 N.E.2d 1325 (Ill. 1982); State v. Matthews, 408 So. 2d 1274 (La. 1982); Lodowski v. State, 490 A.2d 1228 (Md. 1985); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969); People v. DiBiasi, 166 N.E.2d 825 (N.Y. 1960); Lewis v. State, 695 P.2d 528 (Okla. Crim. App. 1984); State v. Haynes, 602 P.2d 272 (Or. 1979). A few courts did not follow the majority rule. *See* State v. Blanford, 306 N.W.2d 93 (Iowa 1981); State v. Smith, 241 S.E.2d 674 (N.C. 1978); State v. Burbine, 451 A.2d 22 (R.I. 1982).

37. 166 N.E.2d 825 (N.Y. 1960).

made in the presence of counsel.[38] While the basis of the rule may at first have been unclear, by 1963 there was no doubt that it was based upon New York law, including the state's constitutional protection for the privilege against self-incrimination, right to counsel, and due process. Chief Judge Fuld, in an opinion for the court that year, declared: "Since we have concluded that a confession obtained under the circumstances present here is inadmissible under New York law, we find it unnecessary to consider whether or not the Supreme Court of the United States would regard its use a violation of the defendant's rights under the Federal Constitution."[39]

Other states did not follow New York in insisting on a strict counsel-present waiver, but most did insist that the failure to advise the suspect of the imminent availability of counsel rendered the suspect's confession infirm. The Supreme Court of Massachusetts[40] reached that conclusion on the basis of a statement in *Miranda* that the suspect's "opportunity to exercise [the rights to remain silent and to be represented by counsel] must be afforded to him throughout the interrogation."[41] Similarly, the Florida Court of Appeal[42] reached the same result with summary reference to the suspect's "constitutional right to have counsel" and with reliance on *Escobedo v. Illinois*.[43] The Pennsylvania Supreme Court reached its conclusion with similarly vague reference to denial of the constitutional right of counsel.[44] Then, the Oregon Supreme Court, in an opinion by Justice Linde, decided *State v. Haynes*.[45]

Justice Linde was not writing on a clean slate, but neither was the slate coherent. The Oregon Supreme Court had previously followed a wavering course. Based primarily on its interpretation of federal law, the court initially rejected the New York rule,[46] later acknowledging that changing federal precedent had undercut the premises of that decision.[47] Still later, the court reaffirmed that a suspect who is already represented by counsel may nevertheless waive counsel's presence and make a valid confession.[48] Noting that the issue prior to arrest is one of the right to remain silent rather than the right to counsel per se, Linde's opinion in *Haynes* declared agreement with the Massachusetts and Pennsylvania courts "that when law enforcement officers have failed to

38. People v. Hobson, 348 N.E.2d 894, 896 (N.Y. 1976).
39. People v. Donovan, 193 N.E.2d 628, 629 (N.Y. 1963).
40. Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969).
41. *Id.* at 565-66.
42. Davis v. State, 287 So. 2d 399, 400 (Fla. Dist. Ct. App. 1973).
43. *Id.* (citing Escobedo v. Illinois, 378 U.S. 478 (1964)).
44. Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977).
45. 602 P.2d 272 (Or. 1979).
46. State v. Kristich, 359 P.2d 1106, 1110 (Or. 1961).
47. State v. Neely, 398 P.2d 482, 485 (Or. 1965).
48. State v. Sanford, 421 P.2d 988, 992 (Or. 1966).

admit counsel to a person in custody or to inform the person of the attorney's efforts to reach him, they cannot thereafter rely on defendant's 'waiver' for the use of his subsequent uncounseled statements or resulting evidence against him."[49] Such a rule was appropriate, Linde reasoned, because "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice . . . ."[50] Significantly, this was a rule that would satisfy the requirements of both the Oregon and federal constitutions.[51]

Justice Linde's common sense observation in *Haynes* that there is a difference between waiving the right to counsel in the abstract and waiving the right to counsel in the flesh, proved enormously influential with other courts. For example, state supreme courts in Delaware,[52] Florida,[53] Illinois,[54] Louisiana,[55] as well as intermediate appellate courts in Colorado,[56] Oklahoma,[57] and Maryland[58] followed the *Haynes* rationale. Unfortunately, however, most of these courts did not follow Judge Fuld's or Justice Linde's lead in basing the result on their state constitutions. Louisiana did so, squarely and exclusively;[59] the Oklahoma court like *Haynes*, referred to both state and federal constitutions;[60] but the other courts, while referring to other state cases,

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49. State v. Haynes, 602 P.2d 272, 278-79 (Or. 1979).

50. *Id.* at 278.

51. It must be said that Justice Linde's opinion in *Haynes*, unlike subsequent opinions for the Oregon court, does not entirely conform to his "first things first" prescription. Perhaps this represents respect for the court's prior decisions.

52. Weber v. State, 457 A.2d 674 (Del. 1983) ("We can not, and do not, conclude that a suspect, who is indifferent to the usual abstract offer of counsel, recited as part of the warnings required by *Miranda*, will disdain a chance to consult a lawyer waiting to see him then and there." (quoting State v. Haynes, 602 P.2d 272, 278 (Or. 1979)).

53. Haliburton v. State, 476 So. 2d 192, 194 (Fla. 1985) (quoting from Chief Justice Bevilacqua's dissenting opinion in State v. Burbine, 451 A.2d 22, 35 (R.I. 1982), which in turn relied upon *Haynes*).

54. People v. Smith, 442 N.E.2d 1325 (Ill. 1982) (quoting at length from the *Haynes* analysis).

55. State v. Matthews, 408 So. 2d 1274 (La. 1982).

56. People v. Somerville, 703 P.2d 615, 617 (Colo. Ct. App. 1985).

57. Lewis v. State, 695 P.2d 528, 530 (Okla. Crim. App. 1984) ("Our agreement with the Oregon Supreme Court is strengthened by similar rulings in other jurisdictions.").

58. Lodowski v. State, 490 A.2d 1228 (Md. 1985); *see also* Elfadl v. State, 485 A.2d 275, 280 (Md. App. 1985) ("It is one thing to say a lawyer has no right to see a client; it is quite another to say that an accused knowingly and intelligently waived his right to counsel and his right against self-incrimination when he is purposely kept in the dark about the fact that his lawyer is in the next room.").

59. In Louisiana, the courts had previously adopted the majority rule on federal grounds, but the state constitution had since been amended to incorporate the *Miranda*-like safeguards, and a state statute guaranteed the right of arrested persons access to counsel. Consequently, the Louisiana Supreme Court relied upon the amended constitution and the statute together with the *Haynes* rationale in reaching its conclusion. State v. Matthews, 408 So. 2d 1274, 1277-78 (La. 1982).

60. *Lewis*, 695 P.2d at 529.

phrased their holdings exclusively in federal constitutional terms.

A minority view also existed. Courts in Iowa and North Carolina rejected the majority rule in favor of a "totality of circumstances" test.[61] Rhode Island also weighed in with a contrary position, and it was that decision which led to the United States Supreme Court's consideration of the issue.

B. *Moran v. Burbine*

In 1986, the United States Supreme Court decided *Moran v. Burbine*.[62] In *Burbine*, an assistant public defender, Ms. Munson, was retained by the suspect's sister late the same afternoon the suspect was taken into custody on suspicion of burglary.[63] Munson immediately telephoned the police station, and a male voice answered "Detective."[64] Munson announced that she represented the suspect, Burbine, and wished to speak to him before any further questioning.[65] She was told the police were "through with" Burbine for the night.[66] Lulled by this representation, Munson did not go to the station.[67] Meanwhile, the police read Burbine his *Miranda* rights but did not tell him that counsel had been retained or had attempted to reach him.[68] After a *Miranda* waiver was obtained, interrogation began. During the evening, Burbine confessed to a murder.[69]

A divided Rhode Island Supreme Court affirmed Burbine's conviction, holding that the police had no duty under *Miranda* to advise him of counsel's availability or to honor Munson's request for access.[70] On habeas, however, the First Circuit granted Burbine relief.[71] The United States Supreme Court reversed, agreeing with the Rhode Island Supreme Court, six to three.[72] Federal law is satisfied by the giving of proper *Miranda* warnings, thus waiver is unaffected by the subsequent interposition of counsel.[73] Justice O'Connor's majority opinion reasoned that a suspect's ignorance of events outside the

61. State v. Blanford, 306 N.W.2d 93, 96 (Iowa 1981) (adopting a "totality of circumstances test"); State v. Smith, 241 S.E.2d 674, 680-81 (N.C. 1978).
62. 475 U.S. 412 (1986).
63. *Id.* at 416-17.
64. *Id.* at 417.
65. *Id.*
66. Moran v. Burbine, 475 U.S. 412, 417 (1986).
67. *Id.*
68. *Id.*
69. *Id.* at 418.
70. Moran v. Burbine, 475 U.S. 412, 418-19 (1986).
71. *Id.* at 419.
72. *Id.* at 434.
73. *Id.* at 422-23.

interrogation room cannot render his voluntary waiver any less voluntary; thus, there could be no violation of the Fifth Amendment privilege against self-incrimination.[74] Nor was the Sixth Amendment violated, since the right to counsel under that provision attaches only upon the filing of formal criminal charges.[75] Finally, while it may be unethical for police to withhold such information from the suspect, such conduct in the case before the court was not so egregious as to constitute a deprivation of the suspect's Fourteenth Amendment right to due process of law.[76] Nevertheless, the Court observed—superfluously in light of *Michigan v. Long*[77]—that states were free to adopt different rules under state law.[78]

The *Burbine* dissenters took issue with the majority on several counts. *Miranda*, they observed, contained language to the effect that a confession obtained by "trickery" could be invalid even if obtained after a *Miranda* warning and otherwise valid waiver, and in their view, intentional withholding of information concerning the imminent availability of counsel fell within that principle.[79] Such police misconduct also constituted, they argued, a denial of due process of law.[80] Ultimately, the case turned upon a

> proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.[81]

C. *Post-Burbine*

When the Court decided *Burbine*, two similar cases were pending, one from Florida and the other from Maryland, in which the state courts had relied on federal law to conclude that confessions obtained in a *Burbine*-like scenario should be excluded from evidence. The Supreme Court remanded these cases for reconsideration in light of their recent decision.

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74. Moran v. Burbine, 475 U.S. 412, 422-23 (1986).
75. *Id.* at 432.
76. *Id.* at 432-34.
77. 463 U.S. 1032 (1983).
78. Moran v. Burbine, 475 U.S. 412, 432-34 (1986).
79. *Id.* at 453-54 (Stevens, J., dissenting).
80. *Id.* at 466-68 (Stevens, J., dissenting).
81. *Id.* at 468 (Stevens, J., dissenting).

Now, the state courts could not avoid confronting the state law issue. Both did so, with opposite results. The Maryland court,[82] even though it found the *Burbine* analysis of the Fifth Amendment issue not to be "persuasive," followed the *Burbine* result on the basis of its own prior opinions.[83] Maryland's prior decisions had declared the content of the state and federal self-incrimination provisions to be congruent in meaning since the two provisions were adopted at about the same time and arose out of similar concerns.[84] The Florida court, however, relied upon the *Burbine* dissent and the reasoning of the Oregon Supreme Court in *Haynes* to conclude that the suspect's statements had been obtained in violation of the due process provisions of its state constitution.[85]

Since *Burbine*, two other state courts which had previously adopted a position contrary to *Burbine* on federal constitutional grounds, or on ambiguous grounds, have been called upon to address the issue anew. The Delaware Supreme Court reaffirmed its pre-*Burbine* position on the basis of the state constitutional right to counsel as an aspect of due process of law.[86] In doing so, it relied upon the reasoning contained in its prior opinion, the dissent in *Burbine*, and the decisions of other state courts.[87]

The Illinois Supreme Court likewise confirmed its prior conclusion, which it characterized—not entirely convincingly—as resting in part on state constitutional grounds.[88] In support of its position on the merits, the Illinois court relied in part upon the fact that Illinois had adopted a new constitution in 1970, and that convention debates indicated that the language of the self-incrimination provision was intended to incorporate then-existing federal constitutional principles which, according to the court, included a principle contrary to *Burbine*.[89] The court relied also upon the history of state court precedents in the areas of due process, self-incrimination, and right to counsel,

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82. Lodowski v. State, 513 A.2d 299 (Md. 1986).

83. *Id.* at 304.

84. *Id.* at 306-07.

85. Haliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987).

86. Bryan v. State, 571 A.2d 170, 175-77 (Del. 1990).

87. *Id.*

88. People v. McCauley, 645 N.E.2d 923 (Ill. 1994). The court characterized People v. Smith, 442 N.E.2d 1325 (Ill. 1982), as resting partly on state law because it relied upon the Oregon Supreme Court's decision in *Haynes*, *id.* at 930, but as discussed in the text, *supra* notes 45-60, Justice Linde's opinion in *Haynes* relied only tangentially on state law, and in any event that was Oregon law, not Illinois law. As Justice Bilandic observed in his separate opinion in *McCauley*, *Smith* neither cited nor discussed the Illinois constitutional privilege against self incrimination. *Id.* at 941. After *Smith*, the Illinois court had decided two cases, People v. Holland, 520 N.E.2d 270, 277-78 (Ill. 1987) and People v. Griggs, 604 N.E.2d 257, 269 (Ill. 1992), in which the court distinguished *Burbine* on its facts. Thus, according to Justice Bilandic, *McCauley* represented a change of course on the part of the Illinois court. *McCauley*, 645 N.E.2d at 941.

89. *Id.* at 929-30.

as well as a pre-*Miranda* statute requiring public officers to allow persons in custody to "admit any practicing attorney . . . whom such person . . . may desire to see or consult."[90] "Considering these facts and principles," the court declared, "it is clear that the constitutional and statutory policies of our State favor a person *having* the assistance of counsel during custodial interrogation . . . ."[91] The court implicitly rejected the view of Justice Bilandic, in dissent, that the conclusion had to be justified on the basis of constitutional language or history suggesting that the framers intended the state privilege to be broader than the Fifth Amendment.

In addition, since *Burbine*, some fourteen courts which had not previously taken a position on the issue have been called upon to do so. The pattern is quite varied. The supreme courts in Indiana,[92] North Carolina,[93] South Carolina,[94] and Mississippi[95] have followed *Burbine* without referring to their respective state constitutions. The Supreme Court of Alabama, while referring to its state constitution, followed *Burbine* in lockstep without independent state constitutional analysis.[96] The Washington Supreme Court likewise followed *Burbine* on the basis of prior decisions which had declared the state court protection for the right of self-incrimination to be congruent with the Fifth Amendment.[97]

Two state supreme courts have chosen to follow *Burbine* on the basis of their own state constitutional analysis. The Supreme Court of Wisconsin, while relying heavily upon the reasoning of *Burbine* and noting that there were no differences in the relevant constitutional language, also expressed its independent concern that a contrary rule would unfairly distinguish among suspects whose families or friends were or were not in a position to engage the services of an attorney and that the rule would be difficult to apply as circumstances varied.[98] The Supreme Court of Tennessee, without indicating any particular deference to the federal view, engaged in an extensive survey of state court opinions on the issue and found itself persuaded by the reasoning, not only of *Burbine*, but also of the state courts which had accepted that view, finding the logic of

90. *Id.* at 938.
91. *Id.*
92. McClaskey v. State, 540 N.E.2d 41 (Ind. 1989).
93. State v. Reese, 353 S.E.2d 352 (N.C. 1987).
94. State v. Drayton, 361 S.E.2d 329 (S.C. 1987).
95. Lee v. State, 631 So. 2d 824 (Miss. 1994).
96. Ex Parte Neelley, 494 So. 2d 697, 699 (Ala. 1986) ("Applying *Moran* . . . of the present case, we hold that neither petitioner's Fifth nor Sixth Amendment rights were violated . . . [n]or do we find this conduct by law enforcement officials violative of the constitution of this state.").
97. State v. Earls, 805 P.2d 211 (Wash. 1991).
98. State v. Hanson, 401 N.W.2d 771, 777-78 (Wis. 1987).

Burbine to be compatible with its own prior decisions.[99] Nothing in the Tennessee court's opinion suggests that it was acceding to the Supreme Court's position by default.

Finally, courts in three states—California,[100] Michigan,[101] and Connecticut[102]—which had not previously considered the issue, departed from the *Burbine* analysis and concluded, on the basis of their state constitutions, that at least under certain circumstances the failure of police to notify a suspect under interrogation of the imminent availability of counsel requires exclusion of an admission or confession. In New Jersey, where the constitution contains no privilege against self-incrimination, the supreme court reached a similar result on the basis of statutory protection for that privilege.[103] In Kentucky, the supreme court, relying on the state's rules of criminal procedure, upheld a trial court's order requiring police to cease questioning a suspect until his family-referred counsel could speak with him.[104]

The California Supreme Court, while declaring that the Supreme Court's decisions defining "fundamental rights and liberties are entitled to respectful consideration," reached its conclusion on the basis of reasoning contained in opinions of other state courts and in the *Burbine* dissent, without suggesting that any particular justification for departing from federal precedent was required.[105] The Michigan court, with a somewhat more extensive analysis of other state cases, followed California's lead. The Connecticut Supreme Court, in arriving at its position on the issue for the first time after *Burbine* was decided, drew upon that state's "long history of recognizing the significance of the right to counsel, even before that right attained federal constitutional importance," and upon its long due process tradition, which it had previously held to require *Miranda* warnings as a matter of state constitutional law.[106]

The New Jersey Supreme Court, in basing its decision on that state's statutory protection of the privilege against self-incrimination, delved into the history of the provision's implementation in the courts, noting a judicial tradition

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99. State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994).

100. People v. Houston, 724 P.2d 1166 (Cal. 1986). The ruling in *Houston* was subsequently "overruled" by constitutional amendment.

101. People v. Wright, 490 N.W.2d 351 (Mich. 1992).

102. State v. Stoddard, 537 A.2d 446 (Conn. 1988).

103. State v. Reed, 627 A.2d 630 (N.J. 1993).

104. West v. Commonwealth, 887 S.W.2d 338 (Ky. 1994).

105. People v. Houston, 724 P.2d 1166, 1174 (Cal. 1986). I am obliged to disclose that I was the author of the *Houston* opinion, and to confess that, while I adhere to the result, in retrospect I think the reasoning could have been improved by reference to the history of development of protections for criminal defendants by California courts.

106. State v. Stoddard, 537 A.2d 446, 451 (Conn. 1988).

recognizing "ancillary rights," including the right to counsel, as essential to the preservation of the privilege.[107] The court, surveying the opinions of other state courts before and after *Burbine*, which imposed upon police a duty to inform a suspect that an attorney is waiting, noted that the several state courts differed in their theoretical approaches, but suggested that they all proceeded from "one supervening principle: the atmosphere of custodial interrogation is inherently coercive and protecting the right against self-incrimination entails counteracting that coercion."[108] Requiring police to inform the suspect of an attorney's presence, the court opined, would be the "most practical means to overcome coercion," as it would "greatly reduce the temptation of law enforcement authorities to pressure the suspect into a confession before the attorney gains access to the suspect."[109] The court considered and rejected modifications which had been adopted by some other state courts, such as the "totality of circumstances" test, or a "balancing test," in favor of a "bright line" rule.[110]

IV. SOME LESSONS

What observations that might be relevant to our understanding of the nature of state constitutionalism can be made with respect to this sampling of cases? I suggest the following. First, in practice, and despite some areas of judicial foot-dragging, the study suggests that state constitutionalism is alive and well. Overall, the debate among the state courts following *Burbine* has been richer and more complex than the majority and dissenting opinions in *Burbine* itself. State courts have grappled with issues that were not considered by the United States Supreme Court—whether, for example, rejection of *Burbine* would involve difficulty in assuring that a lawyer has authority to represent the suspect, or whether it would privilege suspects with friends or relatives wealthy enough to afford a lawyer. State courts have thus confronted and decided various alternatives to the *Burbine* rule: whether, for example, police should be required to advise a suspect of the imminent availability of a lawyer only when the lawyer is physically present at the police station or when the lawyer has called on the telephone; whether it makes a difference that the lawyer is a public defender rather than a private attorney; and whether the exclusion of a confession from evidence should follow automatically from a failure by police to advise the suspect as required or only where the "totality of circumstances" points to involuntariness of waiver.[111]

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107. State v. Reed. 627 A.2d 630, 637 (N.J. 1993).

108. *Id.* at 640.

109. *Id.*

110. *Id.* at 644-45.

111. The Connecticut Supreme Court, for example, has declined to follow what appears to be the majority rule that lack of knowledge of the imminent availability of counsel is always fatal to valid waiver, and insists that the determination be made on the basis of factors such as the

Second, while the almost uniform failure by state courts to discuss their state constitutions prior to *Burbine* is certainly understandable given the assumptions which then prevailed, in retrospect, there is little that can be said in principled support of that practice. The Supreme Court had never passed upon that issue, and its decisions surrounding the self-incrimination privilege and the right to counsel provided no strong basis for predicting what the Court would do. Courts which bypassed their state constitutions in favor of answering the federal question not only violated principles of logic and judicial constraint; they assumed the risk that if they were wrong, as they proved to be, they would incur the embarrassment of being told (directly or in effect) to do what they should have done in the first place. State courts would have created a needless period of uncertainty, and they would have foregone the opportunity to begin laying a foundation for the development of state constitutional principles. Of course, given the assumptions which then prevailed, the practice was understandable; the state constitutional alternative probably never even occurred to these courts. There is even less to be said in support of those courts which continued to ignore state law after *Burbine* was decided.

Third, the sampling of cases demonstrates some of the difficulties, both theoretical and practical, with the "lockstep" approach in which a court decides, in advance, that it will follow the United States Supreme Court's lead. Even if it is assumed that the framers of a particular state constitution "intended" that its self-incrimination and right to counsel provisions would be given roughly the same meaning as comparable provisions of the federal Constitution, they certainly had no clue as to what meaning would be attached to the latter with respect to the issue in *Burbine*. The outcome in *Burbine* could not reasonably be said to have been based upon either some deciphering of the text or upon any evidence of original intent. Rather, the *Burbine* decision was based on the Court's application of the principles which had been declared in *Miranda* and *Escobedo*, and these in turn were premised upon neither text nor history, but upon what the Court considered necessary for the effective implementation of the underlying constitutional principles. Thus, for the Washington court to say that the Washington constitutional provisions at issue had the same meaning as the federal constitutional provisions[112] is the equivalent of saying that the framers of the state constitution intended for those provisions to have whatever meaning might be attributed to them in the future by the United States Supreme Court, without regard to whatever differences might otherwise exist. For the Maryland court to say the same thing in the face of its own articulated

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relationship of the suspect to the attorney, the nature of counsel's request, the extent to which the police had reasonable notice of counsel's request, and the conduct of the suspect. *See* State v. Stoddard, 537 A.2d 446, 456 (Conn. 1988).

112. *See supra* note 97 and accompanying text.

disagreement with the United States Supreme Court's reasoning[113] carries the proposition one step further. For both courts, the troubling question remains: what if the United States Supreme Court one day reverses *Burbine*? Will they be prepared to carry the lockstep approach to its logical conclusion? If so, what principles of constitutional adjudication—what language, or constitutional history, or reasoning—support that result?

Finally, the study suggests the lack of any principled foundation for a state's approach which takes United States Supreme Court decisions as its starting point and then requires some justification for departing from them. With respect to the privilege against self-incrimination, the right to counsel, and due process of law, there were no significant textual differences (except in New Jersey) between the relevant state and federal constitutional provisions. Further, while the Illinois court relied upon the proceedings underlying the 1970 state constitutional convention as indicating an intent to embody certain then existing federal constitutional principles,[114] it would be impossible to contend that the right to be informed, prior to arrest, of the imminent availability of a lawyer (as distinguished from the more general right to counsel) was expressly one of those principles. Moreover, while some courts, such as in Connecticut, relied upon a generalized history of protecting certain rights,[115] most courts found nothing specific to rely on. Thus, an insistence upon textual or historical justification for departing from federal precedent might prove, in this context, fatal to any independent course.

But why, in the end, should deference to the United States Supreme Court be required? The Supreme Court's decision in *Burbine* did not turn upon any matters—assuming there are such matters—within the special competence of that Court. What divided the majority and the dissenters within the Court was, in part, disagreement over what might be called social facts (for example the psychological difference between the suspect knowing about an abstract right to counsel and knowing that a particular lawyer is waiting to talk with him, or the likely impact upon police behavior of adopting one rule or another). Another part of the disagreement occurred over what might be characterized as issues of moral or political philosophy: how far society should go in enabling a suspect to connect with counsel prior to or during interrogation, in light of the virtual certainty that the connection will in most cases result in the suspect being unwilling to talk. As to the social facts, the state courts are likely to be in a better position—and surely in no worse—than the United States Supreme Court to know what goes on in the jailhouse. There is no reason to believe that state court judges are any less adept at moral or philosophical reasoning, or in

113. *See supra* notes 82-84 and accompanying text.
114. *See supra* notes 88-89 and accompanying text.
115. *See supra* note 106 and accompanying text.

extrapolating from the principles of *Miranda* and *Escobedo*, both of which had their origins in state court decisions. If a state court is persuaded by the reasoning of the *Burbine* dissent, and says so, surely that does not render the state court's opinion "unprincipled."

Proponents of state deference in the *Burbine* context seem to be left, at bottom, only with an argument based upon the desirability of uniformity. However, there is no need for uniformity in order to provide predictability for affected parties. Law enforcement officials can easily learn whatever rule is adopted in a particular state with respect to the need to advise suspects of the presence of counsel who wish to talk with them. Within a system premised on federalism, it seems odd to argue that the advantages of diversity must be sacrificed in order to give the appearance of consensus with respect to the content of "fundamental rights." Citizens who are aware of the lack of consensus within the United States Supreme Court itself are not likely to be surprised, or offended, by the lack of uniformity among the states. Justice Linde has put it well:

> Ultimately the question is whether we can face diversity in constitutional rights. Recognition that a right may be guaranteed in one state but not in another is an uncomfortable idea . . . . [I]t departs from the civic faith imparted by high school and college classes, by national organizations and media reports, and by our public rhetoric, that 'constitutional rights' must mean rights shared by all Americans.
>
> Yet, of course, the uncomfortable idea is true . . . Constitutional law is indeed a shared enterprise. But for state courts the enterprise is to apply and enforce the actual guarantees that a state's charter provides, not to substitute a homogenized rhetoric of judicial review. The task for counsel and for the state's academic and professional observers is to hold judges to that enterprise, and to help them in it.[116]

116. *See State Constitutions*, *supra* note 18, at 229.