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State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?

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STATE CONSTITUTIONAL LAW, THE UNITED STATES SUPREME COURT, AND DEMOCRATIC ACCOUNTABILITY: IS THERE A CROCODILE IN THE BATHTUB?

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Abstract: Justice Robert F. Utter of the Washington Supreme Court analyzes the nature of judicial review by state courts interpreting state constitutions. The Article emphasizes the democratic nature of state court decisions. The public may counteract unpopular state court opinions by either voting state court judges out of office or by amending the state constitution. On the other hand, court opinions may be either affirmatively approved or ratified by inaction. State courts also serve as experimental laboratories for the United States Supreme Court by gauging the public response to and practicality of constitutional doctrines. Justice Utter suggests that the more democratic influence upon state court decisions infuses those opinions with greater democratic legitimacy than opinions of the United States Supreme Court. To the extent state opinions are adopted by the United States Supreme Court, the high court partakes of the more democratic aspects of state court constitutional law development.

There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.[1]

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In reality, judges are not asked to refrain from deciding political questions at all; rather they are asked to refrain from deciding political questions in too openly partisan a fashion. . . . Paradoxically, the effectiveness of an appellate judicial decision is related to its ability to transcend mere partisanship; and yet the more effective a decision, the wider its political impact.[2]

The question of the proper role of the judiciary in a democratic society brings two factors into inevitable tension. The first is the ideal of

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1. Former California Supreme Court Justice Otto Kaus, *quoted in* Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.

2. G. WHITE, THE AMERICAN JUDICIAL TRADITION 371 (1976).

an independent judiciary, one capable of demanding strict adherence to the law no matter how unpopular the result. The second is the ideal of democratic accountability of the public servant no matter what the position of power. The more the judiciary is independent of popular pressures, the greater the risk of the judiciary straying from strongly-held popular values. However, the more the judiciary is accountable to popular pressures, the greater the risk it may lose its role of independent protector of nonmajoritarian interests and rights.

This Article does not attempt to suggest a resolution to these competing tensions. Courts seek to resolve daily the reconciliation of conflicts between varied and competing interests.[3] By addressing these issues, courts are continually involved in developing jurisprudence independent of the public will, while at the same time retaining a degree of public acceptance.[4]

Many state courts in recent years have interpreted their state constitutions differently from the federal constitutional doctrine developed by the United States Supreme Court.[5] On the state level, the debate about the proper scope of judicial review must alter because, unlike the federal courts, state courts typically are democratically accountable. In most states, citizens may register discontent with judicial decisions either by voting judges out of office or by amending the state's constitution to undo unpopular constitutional interpretation.[6] State courts that independently interpret state constitutions furnish the state's legislators, media, and voters of their states an opportunity to react to those decisions. In many states where the state supreme court has independently construed the state constitution, the reaction has been favorable; in others, there have been campaigns either to remove judges or to amend the state constitution. Although those campaigns have occasionally met success, more often they have failed.[7] Even more often, state legislators and citizens accept state court decisions without any organized challenge against the court's state constitutional analysis.

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3. But what interests there are in a society and which of these are, and which should be, the subject of legal recognition are questions partly for sociology, partly for law and partly for ethics; and the reconciliation of conflicts between competing interests is in a broad sense part of the problem of justice.

P. FITZGERALD, SALMOND ON JURISPRUDENCE 64 (12th ed. 1966).

4. For an account of how these issues have affected the history of the Washington Supreme Court, see C. SHELDON, A CENTURY OF JUDGING—A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT (1988).

5. *See infra* notes 54–93 and accompanying text.

6. *See infra* notes 94–166 and accompanying text.

7. *See infra* notes 110–158 and accompanying text.

This Article first discusses the current form and historic roots of the debate over the legitimacy and scope of judicial review.[8] The discussion then transfers questions raised by the debate to the arena of state court jurisprudence. Democratic responses to independent state jurisprudence follow. This Article then suggests that the availability of these democratic checks gives state constitutional jurisprudence a democratic legitimacy absent at the federal level. In conclusion, it asks whether incorporation of the analysis of the state court decisions by the United States Supreme Court vests their own decisions with a degree of democratic legitimacy said to be currently lacking in our federal jurisprudence.

I. JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY

A. The Bork Hearings

With the July 1, 1987 nomination of Robert Bork to a position on the United States Supreme Court, the continuing debate over the legitimate scope of judicial review moved out of the courtroom and law school classroom and into the public arena.[9]

The stage was set for this classic discussion in a speech Attorney General Edwin Meese III gave to the American Bar Association, attacking several United States Supreme Court opinions and urging the Court to apply a "Jurisprudence of Original Intention."[10] Robert Bork, advocating in numerous writings the theory of original intent and judicial restraint, was a logical choice by the Reagan administration to be the flag-carrier of this doctrine into the Court.

The Bork nomination was controversial due to the perceived danger that his conservative jurisprudence would upset the ideological bal-

8. *See infra* notes 9–53 and accompanying text.

9. The American public had a greater lesson on the Constitution in its 200th anniversary than probably at any time in its history. I think the debate by everyone's admission was high-minded and was on the issues. . . . It amazed me: I'd get on the train and people would talk to me about the 14th Amendment.

Senate Judiciary Committee Chairman Joseph Biden *quoted in* Reske, *Did Bork Say Too Much?*, A.B.A. J., DEC. 1, 1987, at 74, 75.

10. Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985) [hereinafter Meese, *The Attorney General's View*] (based on the 1985 speech); *Intent of the Framers*, NEWSWEEK, Oct. 28, 1985, at 97. Attorney General Meese has continued his campaign for "original intent" interpretation, alleging the approach to constitutional interpretation taken by many current judges and scholars appears to be "to view the United States Constitution as a document virtually without legally significant, discernible meaning." Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 5 (1988).

ance of the Supreme Court and affect its decisions for many years.[11] Thus, although Bork framed his approach as applying "neutral principles,"[12] the debate surrounding his nomination was an intensely political battle.[13]

Bork's views on the proper scope of judicial review, which he championed and defended in more than thirty hours of testimony before the Senate Judiciary Committee, were originally stated in a 1971 *Indiana Law Journal* article.[14] Bork considers judicial review legitimate only if the Court defines and then applies neutral principles, leaving questions of "liberty" and "equality" for the political process.[15] This analysis rejects entire lines of decisions by the United States Supreme Court. *Griswold v. Connecticut*[16] and *Shelley v. Kraemer*[17] serve as examples. Cases like these, in Bork's view, typify the Court's development of liberties based on value decisions rather than mandates from the explicit language of the United States Constitution or the discernable intent of the framers.

Beyond the perceived threat to decisions that benefit women, minorities, and privacy interests, many have challenged Bork's views on two fronts. The first is that judges do not and cannot know the framers' intent or how it would apply to many of today's problems, which are different in kind rather than degree from those problems envisioned by the framers.[18] Expanding this criticism, Professor Ronald Dworkin points out that "original intent" analysis fails to take into account that many people, in many tiers of review, were involved in the drafting and ratification of the United States Constitution. Dworkin stresses

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11. *See, e.g.*, Moran, *Biden Taps Scholars to Rake Bork Record*, Legal Times, July 13, 1987, at 1, col. 3.

12. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

13. Politics swirled around the nominee from the start, with intense lobbying efforts mounted by those for and against Bork. Money was raised and spent, radio and television ads were aired and piles of briefing books were issued by everyone from the White House and Justice Department to interest groups on the left and right, all designed to show Bork either as a saint or the devil incarnate.

Reske, *supra* note 9, at 74.

14. Bork, *supra* note 12.

15. "There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions." *Id.* at 12.

16. 381 U.S. 479 (1965) (striking a statute prohibiting use of contraceptives by married couples, invoking "privacy rights" in the Constitution); *see* Bork, *supra* note 12, at 7–12.

17. 334 U.S. 1 (1948) (state enforcement of a private racially restrictive covenant violates the fourteenth amendment); *see* Bork, *supra* note 12, at 15–17.

18. McMahon, *Wachtler Critical of Bork's 'Original Intent' Philosophy*, N.Y. L.J., July 7, 1987, at 1.

that the intent of those people can be viewed at several levels of abstraction.[19]

The second criticism of the "original intent" interpretation is that the protection of individual and privacy freedoms has long been viewed as a unique and continuing judicial obligation. Justice William Brennan has noted that the Constitution's longevity lies within the "adaptability of its great principles to cope with current problems and current needs."[20] Proponents of this argument point out that relying upon 200 year-old interpretations of a document that announces fundamental principles would lead to doctrinal stagnation.[21]

Although these criticisms demonstrate both the difficulties of neutrally applying the doctrine of original intent and the great loss to individual freedoms that would result from the doctrine's application, there is one aspect of Bork's criticism that has broad apparent appeal. The foundation of Bork's criticism is the "seeming anomaly of judicial supremacy in a democratic society."[22] Bork asserts the power of judges to govern areas not mandated by specific clauses of the Constitution "is not legitimate in a democracy."[23] These concerns lead Bork to the conclusion that the democratic system requires judges to strictly circumscribe their power.[24] Thus, courts are being asked to apply the intent of the framers 200 years ago, not because the framers' intent is better in and of itself, but because by following this exercise courts will not overstep their role in a democratic system. This returns us to the debate over the democratic legitimacy of judicial review.

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19. R. DWORKIN, A MATTER OF PRINCIPLE 33–57 (1985); Blum, *The Hearings and Original Intent,* A.B.A. J., Dec. 1, 1987, at 78 (interview with Ronald Dworkin); *see also* Brennan, *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L. REV. 433, 435 (1986); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?,* 73 CALIF. L. REV. 1482 (1985).

20. Brennan, *supra* note 19, at 438; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (Chief Justice Marshall's statement that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs").

21. "I believe that we make a serious mistake to accept the belief that the past has done its work for the present, and that our liberty, which is the cornerstone of our democracy, is guaranteed." McMahon, *supra* note 18, at 2.

Stanford Law School Dean Paul Brest is also a strong critic of the "original intent" approach. He concludes an article discussing approaches to constitutional interpretation: "[O]ne can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago." Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204, 238 (1980).

22. Bork, *supra* note 12, at 2.

23. Bork, *Original Intent—The Only Legitimate Basis for Constitutional Decision Making,* 26 JUDGES J. 13, 14 (Summer 1987).

24. "The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments." *Id.*

B. Historic Roots of the Debate

Predating *Marbury v. Madison,*[25] the concept of judicial review—permitting courts to overturn legislation that violates a more "fundamental law"—was used by courts in the colonies and in state courts after independence.[26] State court as well as lower federal court decisions foreshadowed *Marbury v. Madison* and generally stated that the power to overturn legislation as unconstitutional should be wielded only where the violation is very clear.[27]

Since *Marbury v. Madison,* it has been settled that the Court may and will assert the right to find legislative acts unconstitutional and void.[28] Voices challenging judicial review as having no basis in the Constitution's language or in the intent of the framers have lessened in this half of the century.[29] Nevertheless, the lingering questions about the proper scope of judicial review in a democratic system continue to trouble judges and scholars.

Harvard law professor James B. Thayer was an early advocate of the position that, if the United States Supreme Court exercised judicial review at all, it must do so with great restraint.[30] Thayer's thinking affected Justices Holmes, Brandeis, and Frankfurter, the careers of whom all stand for the doctrine of judicial self-restraint.[31]

In contrast, Horace Lurton, Associate Justice on the United States Supreme Court from 1909 to 1914, was an early defender of judicial review. He argued that public opinion and the oath of office are insufficient guarantees of ensuring that legislators stay within constitutional boundaries and that the courts are necessary to restrain the executive

25. 5 U.S. (1 Cranch) 137 (1803).

26. Corwin, *The Establishment of Judicial Review,* 9 MICH. L. REV. 102 (1910).

27. "But the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good." Kamper v. Hawkins, 1 Va. Cas. 20, 61, (1793) (Tyler, J., concurring); *see also* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893).

28. This is despite the following prediction:

> The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution.

Administrators of Byrne v. Administrators of Stewart, 1 S.C. Eq. (3 Des.) 466 (1812), *quoted in* Thayer, *supra* note 27, at 142.

29. Even Judge John B. Gibson of the Pennsylvania Supreme Court, an early opponent to judicial review, recanted his bold views challenging the legitimacy of judicial review, acknowledging the necessity for review. Melone & Mace, *Judicial Review: The Usurpation and Democracy Questions,* 71 JUDICATURE 202, 203–04 (1988).

30. Thayer, *supra* note 27.

31. Melone & Mace, *supra* note 29, at 203–04.

and legislative branches.[32] Lurton asserted that courts are the "guardians of the fundamental law which conducts and controls the otherwise uncontrollable legislative power,"[33] and there was little danger of courts over-stepping that function and acting as legislatures.[34]

Louis Boudin, a prominent New York labor lawyer,[35] challenged Justice Lurton's theory of the historic validity of judicial review.[36] Boudin maintained that even if the framers intended judicial review, the Court should use self-restraint and not wield its power to determine policy issues in an unruled manner, a situation labeled "judicial despotism."[37] Boudin asserted that the Court's "open assumption of legislative discretion"[38] in decisions such as *Lochner v. New York*[39] fulfilled Justice Clifford's fears of a despotism by the judiciary.[40]

C. Incompatibility of Judicial Review with Democracy

The most persistent criticism of judicial review is that unfettered power by a nonelected judiciary is inconsistent with democracy. The argument maintains that judicial review conflicts with democratic majority rule.[41] Yet many defend judicial review as necessary to a democracy because it can prevent a tyranny by the majority. This

32. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9, 13–16 (1911); *see* Melone & Mace, *supra* note 29, at 204–05.

33. Lurton, *supra* note 32, at 24.

34. *Id.*

35. At the time, labor interests were opposed to active judicial review by the Court, as the Court was then using theories such as substantive due process and liberty of contract to strike legislation designed to protect workers. Melone & Mace, *supra* note 29, at 205.

36. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238 (1911). This aspect of Boudin's critique was challenged by Charles Beard, who analyzed speeches and writings by the framers and concluded that most of the principal players at the Constitutional Convention favored judicial review. Beard, *The Supreme Court—Usurper or Grantee?*, 27 POL. SCI. Q. 1 (1912).

37. Boudin, *supra* note 36, at 262–64.

38. *Id.* at 269.

39. 198 U.S. 45 (1905) (striking legislation limiting work hours in the name of "substantive due process"). The *Lochner* opinion has become symbolic of the Court's "noninterpretive" mode of constitutional analysis. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–14 (1975).

40. Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.

Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 699 (1874) (Clifford, J., dissenting), *quoted in* Boudin, *supra* note 36, at 262.

41. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 815 (1974); *see also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

defense is premised on the realization that majority rule is only one aspect of America's constitutional democracy. Individual liberties and the rights of the minority are equally important.[42] Professor Eugene Rostow argues that judicial review "is implicit in the conception of a written Constitution delegating limited powers."[43]

Professor William Bishin has summarized the argument that judicial review is consistent with democratic theory.[44] He first emphasizes that the American system of constitutional democracy is not entirely based on principles of majoritarianism. Thus, judicial review can be seen as just another facet of constitutional democracy—such as constitutional limitations on who may serve as president, and the supermajorities required for some legislative action—that is not strictly majoritarian, but instead acts to restrict the majority.[45] Bishin notes that strict majoritarianism can take on characteristics of a tyranny,[46] and the judicial branch is the appropriate agency to limit the majority's power.[47] An important aspect of American conceptions of democracy is the promotion of individual freedoms. Because giving total freedom to one person means taking it away from another, there must be a legitimate, authoritative statement of values, such as the Constitution, to determine rights to competing freedoms.[48] The courts can and should interpret the vague language of the Constitution, as well as develop constitutional doctrine based on accepted values of society and other objective evidence of meaning from the Constitution's text and organization.[49]

Some recent commentators attempt, as did Thayer, to resolve the tension between judicial review and democratic (majoritarian) principles. These commentators accept only strictly constrained judicial review.[50] Professor John Ely argues that the democracy-aiding function of judicial review is promoted only where the offending legislation interferes with an open political process.[51] Under this view, judicial review becomes wholly illegitimate where the Court would impose its

42. Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193, 195 (1952).

43. *Id.*

44. Bishin, *Judicial Review in Democratic Theory,* 50 S. CAL. L. REV. 1099 (1977).

45. *Id.* at 1108–12.

46. *Id.* at 1112–17.

47. *Id.* at 1117–18.

48. *Id.* at 1113.

49. *Id.* at 1134–35.

50. *See, e.g.,* J. ELY, DEMOCRACY AND DISTRUST (1980); Meese, *The Attorney General's View, supra* note 10; Bork, *supra* note 12.

51. J. ELY, *supra* note 50.

own values in derogation of the majority's as voted through the legislature.[52] Other commentators challenge this policy of so constraining the judiciary, arguing that it would inhibit the quality of decisions.[53]

The judiciary is in a unique position to protect fundamental constitutional principles threatened by ill-conceived legislation. Nonetheless, courts and commentators supporting this function must consider the complaints against the institution. Those complaints assert that allowing unelected judges the unfettered power to overturn the will of the people, without any meaningful recourse by the people to reverse such actions, violates democratic principles.

The debate about the role of judicial review in a constitutional democracy has largely taken place on the federal stage. Moving the debate to the state arena significantly changes the issues. Several aspects of state court decision-making make judicial review seem less threatening. Decisions by state courts affect only the individual states; the scope of the decisions is much smaller than that of the United States Supreme Court's decisions. The United States Supreme Court may also review many state court decisions. Those decisions not within the Supreme Court's jurisdiction may be modified through changes in state statutes or by amendments to state constitutions. Finally, most state judges are more democratically accountable through judicial elections than their federal counterparts.

II. STATE JUDICIAL ACTIVISM

Recent developments in state court jurisprudence bring the proper scope of state judicial review into public debate with a frequency approaching that of the United States Supreme Court. The last decade and a half has seen a marked increase in state courts independently interpreting their state constitutions. At last count more than 450 published state court opinions interpret state constitutions as going beyond federal constitutional guarantees.[54] A plethora of law review

52. *Id.*

53. Berch, *An Essay on the Role of the Supreme Court in the Adjudication of Constitutional Rights*, 1984 ARIZ. ST. L.J. 283; Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Lusky, *"Government by Judiciary": What Price Legitimacy?*, 6 HASTINGS CONST. L.Q. 403 (1979); Satter, *Changing Roles of Courts and Legislatures*, 85 CASE & COM. 18 (July-Aug. 1980).

54. Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 JUDICATURE 100, 100–01 (1987); Wermiel, *Asserting Rights: State Supreme Courts Are Feeling Their Oats About Civil Liberties*, Wall St. J., June 15, 1988, at A1, col. 1; *see also* Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS 111 (Summer 1986), *reprinted in* 55 U. CIN. L. REV. 317, 317 (1986).

articles commenting on the phenomenon has paralleled the growth of state constitutional cases.[55]

A. Traditional State Constitutional Jurisprudence

Independent interpretation of state constitutions is not a novel phenomenon. From the earliest stages of their histories, state courts have relied on state constitutions, all of which have bills of rights similar to, yet varying in some respects from, the federal Bill of Rights. In fact, prior to the incorporation of most of the Bill of Rights under the fourteenth amendment, the first ten federal amendments explicitly were held inapplicable to the states.[56] Thus, state courts "routinely resolved constitutional issues without reference to the federal constitution."[57] The state courts' right and obligation to rely on and interpret their constitutions was stated in 1855 by Justice Smith of the Wisconsin Supreme Court:

> The people . . . made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe and stand by ours.[58]

In many instances state constitutional decisions preceded analysis of individual rights under the United States Constitution. For example, state courts developed the exclusionary rule,[59] which was later

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55. *See* Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS 141 (Summer 1986), *reprinted in* 13 HASTINGS CONST. L.Q. 599, 599 (1986).

56. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . . [The limitations in the federal Constitution] are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons for different purposes.

Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833); *see also Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 275–83 (1973) [hereinafter *Project Report*].

57. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144 (1985); *see also* Abrahamson & Gutmann, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88, 96 (1987); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501–02 (1977). For a history of the early constitutions, see Shapiro, *State Constitutional Doctrine and the Criminal Process*, 16 SETON HALL L. REV. 630 (1986); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

58. Attorney Gen. *ex rel.* Bashford v. Barstow, 4 Wis. 567, 758 (1855), *quoted in* Abrahamson, *Homegrown Justice: The State Constitutions*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 306, 312 (B. McGraw ed. 1985).

59. The exclusionary rule prohibits the use, in a criminal trial, of evidence obtained in violation of the defendant's constitutional rights.

adopted by the United States Supreme Court in *Weeks v. United States*[60] and applied to the state courts after several states had already adopted it.[61] *Gideon v. Wainwright,*[62] which guaranteed indigent criminal defendants counsel at public expense, followed more than 100 years of state constitutional jurisprudence, and has been characterized as bringing "only a few laggard states into line."[63] The federal Bill of Rights, of course, was based largely on already existing state constitutions.[64]

In the 1960's, the Warren Court held that most of the federal Bill of Rights applied to the states through the fourteenth amendment. The Court also gave a broader interpretation of those rights than had been applied by most states through their own constitutions. This development reversed the traditional roles of the state and federal courts, for the first time giving the federal Constitution the primary role in protecting most individual rights.[65] After the consequent period of relative dormancy of state constitutional rights, in the late 1970's and 1980's state courts began to reaffirm their traditional function as the primary protectors and interpreters of those rights.

B. "New Federalism"

When Warren Burger replaced Earl Warren as Chief Justice, there began a gradual retrenchment of several key Supreme Court cases interpreting the United States Constitution to protect certain individual liberties and rights. These changes ushered in a resurgence of interest in state constitutions as protectors of those rights that had been nurtured by the Warren Court. This movement is sometimes referred to as the "new federalism."[66]

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60. 232 U.S. 383 (1914).

61. Mapp v. Ohio, 367 U.S. 643 (1961); *see* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903), *rev'd,* State v. Tonn, 195 Iowa 94, 191 N.W. 530 (1923); *Project Report, supra* note 56, at 322–50 (appendix listing states that adopted exclusionary rule and right to counsel before required by United States Supreme Court cases).

62. 372 U.S. 335 (1963).

63. Abrahamson & Gutmann, *supra* note 57, at 95; *see also Project Report, supra* note 56, at 322–50.

64. Brennan, *supra* note 57, at 501.

65. *Project Report, supra* note 56, at 275–84; *see also* Abrahamson, *supra* note 57, at 1147; Note, *supra* note 57, at 1328.

66. *See, e.g.,* Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?* in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166, 166 (B. McGraw ed. 1985); Abrahamson & Gutmann, *supra* note 57, at 88.

Professor Collins views the new federalism in structural terms, "federalism entails the notion that proper respect be accorded to state institutions performing those separate functions

In 1977, Justice William Brennan published a law review article reflecting the state constitutional renaissance.[67] Justice Brennan recognized the trend of state courts construing state constitutional counterparts of the Bill of Rights as guaranteeing state citizens more protection than the federal constitution.[68] He supported this development and encouraged the bar to raise state constitutional questions before state courts.[69] Justice Brennan's thesis explains that state law can supplement federal minimums. He stated recently in a lecture at New York University that the Court's present "contraction of federal rights and remedies" under the United States Constitution "mandates the assumption of a more responsible state court role."[70]

Beyond merely reacting to recent Supreme Court doctrine, several commentators advance another rationale for state courts resolving cases under their state constitutions before turning to the federal Constitution. These commentators maintain that such an approach better fulfills the state constitution's traditional role as primary protector of individual liberties and better serves principles of federalism.[71] An increasing number of state courts are following this approach.[72]

C. State Court Independent Analysis

State court independent interpretation of state constitutions often receives its impetus when the United States Supreme Court overrules or minimizes its own previous bright line rules for criminal defendants' rights. State courts often choose to reject the newer stance of the

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associated with the concept of sovereignty." Collins, *Reliance on State Constitutions—Away From a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1, 5 (1981).

Justice Hugo Black described federalism as:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971); *see also Project Report, supra* note 56, at 285–86.

67. Brennan, *supra* note 57, at 489.

68. *Id.* at 495, 502.

69. *Id.* at 502.

70. Brennan, *The Bill of Rights: State Constitutions as Guardians of Individual Rights,* 59 N.Y. ST. B.J. 10, 17 (May 1987).

71. *See, e.g.,* Galie, *supra* note 54; Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379 (1980); Comment, *The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution,* 38 ME. L. REV. 491 (1986).

72. *See* State v. Cadman, 476 A.2d 1148 (Me. 1984); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983); Patchogue-Medford Congress of Teachers v. Board of Educ., 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987); Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 653 P.2d 970 (1982); State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984); *see also* Galie, *supra* note 54, at 103.

Court, especially where the prior bright line rule has become an established norm for state law enforcement. The state courts cite their own constitutions as the justification for declining to follow the Supreme Court's retrenchment from the prior rule.[73]

One example of this phenomenon can be traced to the 1960's, when the Supreme Court established a bright line rule to determine if information provided by an informant was sufficiently reliable to provide the basis of a warrant.[74] The test, commonly known as the "*Aguilar-Spinelli* test," was set forth in *Aguilar v. Texas*[75] and *Spinelli v. United States*.[76] Under *Aguilar-Spinelli,* information provided to police by a confidential informant may form the basis of a warrant only if it satisfies a two-prong test. The first prong, basis of knowledge, requires the police to reveal the informant's source of information. The second prong, veracity, requires the police to show proof of the informant's credibility or reliability. Courts and commentators have recognized that the two prongs of the *Aguilar-Spinelli* test protect fourth amendment rights.[77]

In 1983, the Court rejected *Aguilar-Spinelli* in favor of a "totality-of-the-circumstances" test in *Illinois v. Gates*.[78] Under *Gates,* magistrates need not specifically satisfy either the basis of knowledge or the veracity prong, but need only weigh the informant's information and "make a practical, common-sense decision."[79] The *Gates* test provides considerably less protection to criminal suspects than *Aguilar-Spinelli.*

Despite the Court's finding that its previous rule impeded law enforcement, currently five state courts explicitly reject the *Gates* test

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73. *See* Brennan, *supra* note 70; Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C.L. REV. 353 (1984).

74. Other examples include reaction to the Court's retrenchment in Harris v. New York, 401 U.S. 222 (1971), of the fifth amendment right to warnings identified in Miranda v. Arizona, 384 U.S. 436 (1966), and reaction to the Court's adoption of a good faith exception to the fourth amendment exclusionary rule in United States v. Leon, 468 U.S. 897 (1984). Mosk, *The Emerging Agenda in State Constitutional Rights Law,* 496 ANNALS 54 (Mar. 1988); Note, United States v. Leon *and* Illinois v. Gates: *A Call for State Courts to Develop State Constitutional Law,* 1987 U. ILL. L. REV. 311; Note, Miranda *and the State Constitution: State Courts Take a Stand,* 39 VAND. L. REV. 1693, 1717–30 (1986).

75. 378 U.S. 108 (1964).

76. 393 U.S. 410 (1969).

77. The *Aguilar* test protects fourth amendment rights by requiring magistrates to verify informant information, therefore insuring that magistrates only issue warrants supported by reliable information. The *Aguilar* test also protects fourth amendment rights by providing a bright-line standard, thus insuring that magistrates will follow the test because it is easily understood and easily applied.

Note, *supra* note 74, at 321.

78. 462 U.S. 213 (1983).

79. *Id.* at 238.

in favor of the bright-line rule of *Aguilar-Spinelli*.[80] A number of states, on the other hand, have declined to establish a rule differing from *Gates*.[81] In the states that rejected *Gates*, the *Aguilar-Spinelli* test's clear law enforcement guidelines and ensurance of informant information reliability have proved to be a major impetus in its retention.[82] A second factor leading states to retain *Aguilar-Spinelli* is that many state courts realize that blindly following the Supreme Court in its advance and retreat from individual rights is undesirable where the state high courts have already based holdings on a prior rule.[83]

The decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. Upton* (*Upton II*)[84] typifies the development of state courts independently interpreting state constitutions. The Massachusetts court had originally decided the case under the United States Constitution and had applied the newly announced *Gates* rule.[85] But the Massachusetts court did not interpret the *Gates* opinion as "decreeing a standardless 'totality of the circumstances' test."[86] However, because the Supreme Court had in fact intended *Gates* to

80. State v. Kimbro, 197 Conn. 219, 496 A.2d 498, 507 (1985); Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548, 556–58 (1985); People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 444–45, 497 N.Y.S.2d 618, 623–24 (1985); State v. Jackson, 102 Wash. 2d 432, 439–43, 688 P.2d 136, 138–43 (1984); Note, *supra* note 74; *see also* Note, *Closing the Gates: A Nebraska Constitutional Standard for Search and Seizure*, 63 NEB. L. REV. 514, 565 (1984).

81. Thompson v. State, 280 Ark. 265, 658 S.W.2d 350, 352 (1983); People v. Pannebaker, 714 P.2d 904, 907 (Colo. 1986); State v. Johnson, 110 Idaho 516, 716 P.2d 1288, 1299 (1986); State v. Lang, 105 Idaho 683, 672 P.2d 561, 561–62 (1983); People v. Tisler, 103 Ill. 2d 226, 469 N.E.2d 147, 157–58 (1984); State v. Rose, 8 Kan. App. 2d 659, 665 P.2d 1111, 1113–15 (1983); Beemer v. Commonwealth, 665 S.W.2d 912, 915 (Ky. 1984); Potts v. State, 300 Md. 567, 479 A.2d 1335, 1339 (1984); Lee v. State, 435 So. 2d 674 (Miss. 1983); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254, 259 (1984); Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921, 926 (1985); State v. Adkins, 346 S.E.2d 762, 773 (W. Va. 1986); Bonsness v. State, 672 P.2d 1291, 1293 (Wyo. 1983).

82. "The *Aguilar-Spinelli* two-pronged inquiry has proven a satisfactory method of providing reasonable assurance that probable cause determinations are based on information derived from a credible source with firsthand information, and we are not convinced that the *Gates* test offers a satisfactory alternative." People v. Griminger, 71 N.Y.2d 635, 524 N.E.2d 409, 411, 529 N.Y.S.2d 55, 57 (1988); *see also* State v. Jackson, 102 Wash. 2d 432, 436–38, 688 P.2d 136, 139–40 (1984).

83. In the present case, the State asks us to reject . . . established jurisprudence [based on the *Aguilar-Spinelli* test] and follow, blindly, the lead of the United States Supreme Court. This we are neither required nor inclined to do.

Prior reliance on federal precedent and federal constitutional provisions do not preclude us from taking a more expansive view of [Washington] Const. art. I, § 7, where the United States Supreme Court determines to further limit federal guaranties in a manner inconsistent with our prior pronouncements.

State v. Jackson, 102 Wash. 2d 432, 438–39, 688 P.2d 136, 140–41 (1984); *see also* State v. Lang, 105 Idaho 683, 672 P.2d 561, 569 (1983) (Bistline, J., dissenting) (criticizing Idaho court for being "a satellite in the eccentric orbiting of the High Court").

84. 394 Mass. 363, 476 N.E.2d 548 (1985).

85. Commonwealth v. Upton (*Upton I*), 390 Mass. 562, 458 N.E.2d 717 (1983).

86. *Id.* at 721.

announce such a test, it overruled the Massachusetts opinion in *Massachusetts v. Upton*.[87] The Massachusetts Supreme Judicial Court on remand concluded that the Massachusetts Constitution provides the protections of the *Aguilar-Spinelli* test.[88] In reaching that conclusion, the Massachusetts court asserted its historical justification for diverging from the federal analysis:

> The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth, and this has been thought to be particularly true of the relationship between the Fourth Amendment and [Massachusetts Constitution] art. 14. . . . In particular situations, on similar facts, we have reached different results under the State Constitution from those that were reached by the Supreme Court of the United States under the Federal Constitution. On occasion, the differences can be explained because of different language in the two Constitutions. . . . On the other hand, in deciding similar constitutional questions, the two courts have reached contrary results based on differences of opinion concerning the application of similar constitutional principles.[89]

Ultimately, the Massachusetts Supreme Judicial Court remained loyal to the *Aguilar-Spinelli* test because it was convinced that this rule provided better protections to criminally accused and a better guide to law enforcement than *Gates*.[90]

As with the Washington Supreme Court in *State v. Jackson*,[91] the Massachusetts court noted that *Aguilar-Spinelli* worked in practice; therefore it did not accept the United States Supreme Court's reasoning in rejecting that test.[92] With the exception of California,[93] in none of the states rejecting the *Gates* test has the electorate or legislature amended the state constitution to return the state to the federal standard.

87. 466 U.S. 727 (1984).

88. Commonwealth v. Upton (*Upton II*), 394 Mass. 363, 476 N.E.2d 548 (1985).

89. *Upton II*, 476 N.E.2d at 555 (1985) (citations omitted).

90. We reject the "totality of the circumstances" test now espoused by a majority of the United States Supreme Court. That standard is flexible, but is also "unacceptably shapeless and permissive." . . . The Federal test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause.

Id. at 556 (citation omitted).

91. 102 Wash. 2d 432, 436–38, 688 P.2d 136, 139–40 (1984).

92. *Upton II*, 476 N.E.2d at 557; *see also* State v. Jones, 706 P.2d 317, 321–24 (Alaska 1985) (rebutting six propositions on which the United States Supreme Court justified its rejection of the *Aguilar-Spinelli* test).

93. Voters in California passed a ballot initiative generally allowing admission of evidence that meets federal constitutional requirements. *See infra* note 135 and accompanying text.

III. DEMOCRATIC LEGITIMATION OF STATE COURT ACTIONS

A. State Systems and Democratic Accountability

Criticism of judicial review by the United States Supreme Court for being undemocratic rests largely on the practical impossibility of overturning an unpopular decision and the recognition that federal justices are appointed for life.[94] Of the 5000 amendments to the United States Constitution introduced in Congress,[95] only twenty-six have passed under the stringent procedures of Article V.[96] Few successful constitutional amendments have been in response to unpopular United States Supreme Court decisions.[97] Professor Eugene Rostow has pointed out, however, that independent constitutional review by the judiciary is legitimized by the power and final responsibility of the people to amend the constitution.[98]

State court decisions are dramatically more vulnerable to democratic influences. In the majority of states, justices[99] are either elected initially or citizens vote periodically on the retention of appointed justices.[100] Most states adopted popular election of the judiciary in the

94. United States Supreme Court justices are appointed by the President, subject to approval by the Senate. U.S. CONST. art. II, § 2, cl. 2. The term of office of federal judges is for life, "during good Behavior." *Id.* art. III, § 1. Thus, it is impossible to vote a United States Supreme Court justice out of office because of unpopular decisions interpreting the Constitution.

95. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 HARV. L. REV. 386, 427 (1983).

96. U.S. CONST. art. V provides in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

97. J. CHOPER, *supra* note 41, at 49; Dellinger, *supra* note 95, at 414–15 (1983). Franklin D. Roosevelt rejected the use of a constitutional amendment to ensure the constitutionality of his New Deal program, despite his huge margin of victory in his 1936 election to the presidency, and instead sought to gain this result through an attempt to pack the Court. *Id.* at 429–30.

The eleventh amendment stands as a rare example of Congress seeking to alter Supreme Court constitutional jurisprudence. Specifically meant to overturn Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), early versions of the amendment were proposed in Congress within three days after the decision's announcement. *See* P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 773–74 (1987).

98. Rostow, *supra* note 42, at 197–98; *see also* Fisher, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence,* 11 HASTINGS CONST. L.Q. 43, 89 n.225 (1983).

99. I use the term "justice" to refer to a judge on a state court of last resort. Much of my discussion, however, might also apply to lower state court judges.

100. THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 157–73 (1988-89 ed.) [hereinafter THE BOOK OF STATES].

mid- to late nineteenth century, seeing it as a means to reinforce the credibility of judicial decision-making.[101] Although judicial positions are typically more secure in length of term than those of the state legislature, state judges generally are more answerable to the democratic process than their federal counterparts.[102]

Another democratic check on state judicial review is the amendment of state constitutions. Although procedures vary from state to state, it is generally much simpler to amend a state's constitution than it would be to amend the Constitution of the United States.[103] The current state constitutions have been amended more than 5300 times.[104] Most may be amended by a majority of the popular vote ratifying a proposal which has passed the legislature.[105] In some states, a state constitutional amendment may have its inception in a popular initiative followed by a referendum vote.[106] It is also simpler for states to call constitutional conventions, and some have done so several times.[107] Constitutional amendment has been the most important electoral check on state court interpretation.[108]

The two democratic checks on the state judiciary just mentioned are virtually nonexistent at the federal level. Some commentators feel that these checks diffuse the criticism that active judicial review is illegitimate simply because it is antithetical to the democratic principles.[109] To put it more positively, state opinions interpreting state constitutions may be more democratically legitimate than their federal counterparts.

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101. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920,* 1984 AM. B. FOUND. RES. J. 345, 346–47.

102. Besides the election process, Professor Robert Thompson has identified three different types of "accountability" of judges: Accountability by review by a higher court, accountability through opinion writing, and accountability to a commission or special tribunal. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate,* 59 S. CAL. L. REV. 809, 837–39 (1986). In addition to the "discipline impartiality" served by opinion writing, the process of stating reasons for decisions can inform the voters of a justice's approach and philosophy. *Id.* at 838.

103. *See* Fischer, *supra* note 98, at 46–47.

104. Kincaid, *State Constitutions in the Federal System,* 496 ANNALS 12, 14 (Mar. 1988).

105. THE BOOK OF THE STATES, *supra* note 100, at 16–17. Legislatures may present a state constitutional proposal to the general electorate after approving the measure by a vote ranging from a simple majority to a two-thirds majority. *Id.*

106. *Id.* at 18.

107. *Id.* at 2–3, 19–20.

108. Wilkes, *First Things Last: Amendomania and State Bills of Rights,* 54 MISS. L.J. 223, 233 (1984) (state constitutional amendments limiting procedural rights in criminal cases).

109. *E.g.,* Galie, *supra* note 54, at 108–09.

B. Examples of Democratic Input to State Jurisprudence

The potential exists for state citizens and legislatures to use the powers granted by their constitutions to check the power of their judiciary. In most states where courts have reached different results than the United States Supreme Court on similar facts, no change in the state constitution resulted. On a few, well publicized occasions, there have been strong reactions.

1. Amendment

Oregon voters, after seeing a steady stream of Oregon cases rely upon the state constitution to afford protection to the criminally accused, recently defeated a measure similar to the California "Victims' Bill of Rights."[110] The measure would have amended or repealed statutes more protective of rights of the criminally accused than required by the United States Constitution.[111] The Oregon Supreme Court is entitled to consider the defeat of this measure a democratic legitimation of much of its independent state constitutional analysis.

In the area of search and seizure, Washington also has developed a line of cases that interprets the privacy clause of the Washington Constitution differently from the United States Supreme Court's interpretation of the fourth amendment.[112] It is now established that article I, section 7 of the Washington Constitution provides greater protection

110. *See infra* text accompanying notes 134–36.

111. Collins, *The New Federalism is Thriving Despite Setbacks and Losses in 1984*, NAT'L L.J., Apr. 29, 1985, at 32; Wells v. Paulus, 296 Or. 338, 675 P.2d 482 (1984) (summarizing provisions of the ballot measure).

112. The texts of the Washington state and federal constitutional provisions prohibiting illegal searches and seizures differ significantly. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. The earlier "new federalism" cases that give independent meaning to the Washington Constitution's independent language are: State v. Ringer, 100 Wash. 2d 686, 700–01, 674 P.2d 1240, 1248 (1983) (search incident to arrest requires exigency; no general "automobile exception" under Washington constitution), *overruled in part* State v. Stroud, 106 Wash. 2d 144, 150–53, 720 P.2d 436, 440–41 (1986); State v. White, 97 Wash. 2d 92, 110, 640 P.2d 1061, 1071 (1982) (privacy rights are paramount concern of art. I, § 7 of Washington Constitution); State v. Simpson, 95 Wash. 2d 170, 179–81, 622 P.2d 1199, 1205–06 (1980) (automatic standing under Washington Constitution).

against warrantless searches and seizures than does the fourth amendment.[113] In 1985, the Washington Attorney General requested the Washington Legislature to introduce a state constitutional amendment requiring state courts to apply current federal court analysis to search and seizure cases.[114] That measure met defeat in both houses of the Washington Legislature.[115] Thereafter the Washington Supreme Court continued to interpret the state constitution as providing more protections than its federal counterpart.[116]

Newspaper editorials often indicate the range of citizen opinion on constitutional cases.[117] The Hawaiian press reaction to the Hawaii Supreme Court's decision in *State v. Kam,*[118] finding the sale of obscene materials protected by the privacy guarantee of the Hawaii Constitution, serves as an example. The commentary ranged from acclaim of the decision as "a victory for civil liberties that should not threaten . . . community morality,"[119] to its condemnation as "a major setback in the battle against pornography."[120] Such mixed signals may reflect a lack of public consensus on the issue. Thus, where an important state court decision interprets the state constitution to provide more protection than its federal counterpart, the absence of negative commentary is significant.

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113. *See, e.g.,* State v. Stroud, 106 Wash. 2d 144, 148–50, 720 P.2d 436, 439 (1986); State v. Simpson, 95 Wash. 2d 170, 177–79, 622 P.2d 1199, 1204–05 (1980).

114. H.J. Res. 11, 49th Sess., 1985 Regular Sess., Wash. Legis. Bills 1985-86; S.J. Res. 119, 49th Sess., 1985 Regular Sess., Wash. Legis. Bills 1985-86.

115. H. Journal, 49th Sess., 1985 Regular Sess., at 109, 2396; S. Journal, 49th Sess., 1985 Regular Sess., at 228, 2418.

116. Seattle v. Mesiani, 110 Wash. 2d 454, 457, 755 P.2d 775, 777 (1988) (holding there is no diminished expectation of privacy in automobiles; sobriety checkpoints without authority of law violate Washington Constitution); State v. Gunwall, 106 Wash. 2d 54, 68, 720 P.2d 808, 816 (1986) (obtaining telephone records without a warrant violates Washington Constitution); State v. Stroud, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986) (search incident to arrest does not extend to locked containers in automobiles); State v. Myrick, 102 Wash. 2d 506, 513, 688 P.2d 151, 153–54 (1984) (Washington Constitution protects privacy itself, not merely an "expectation of privacy"); State v. Chrisman, 100 Wash. 2d 814, 821, 676 P.2d 419, 424 (1984) (warrantless search of dormitory room following misdemeanor arrest violates Washington Constitution). *But see* State v. Stroud, 106 Wash. 2d 144, 150, 720 P.2d 436, 440 (1986) (overruling in part and retreating from some of the analysis in State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983)).

117. The most recent of Washington's privacy cases was a decision interpreting the privacy provision of the Washington Constitution as prohibiting a police program of warrantless road blocks against drunk drivers. Seattle v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775 (1988). Although that police program inspired intense debate during its duration, the opinion invalidating the program received uniformly favorable editorial reactions. *E.g.,* Anacortes Am., May 25, 1988, at 4, col. 1; The Olympian, May 18, 1988, at 9A, col. 1; The Seattle Times, May 16, 1988, at A10, col. 1.

118. __ Haw. __, 748 P.2d 372 (1988).

119. Honolulu Advertiser, Jan. 11, 1988, at A6, col. 1.

120. Honolulu Star-Bulletin, Jan. 12, 1988, at A16, col. 1.

Across the country there are other indications of popular acceptance of "new federalism," or at least popular acquiescence in the new directions charted by state courts. Rhode Island voters recently reaffirmed "new federalism" by amending their constitution to state that the individual rights it protects "stand independent of the U.S. Constitution."[121]

Professor Donald Wilkes lists nineteen important amendments to state bills of rights between 1970 and 1984.[122] In addition, in 1987 Professor Janice C. May surveyed constitutional amendment and revision in the states.[123] This research shows that with certain notable exceptions, the amendments do not relate to the new federalism decisions, but rather to clear provisions in the state constitutions. Professor May noted: "Compared with other articles of state constitutions, the bill of rights is the target of fewer changes than the other substantive provisions . . . . The relatively small number of proposals reenforces the observation made in the preceding pages that state bills of rights have not been changed a great deal."[124] In fact, May concluded that if the amendment process is viewed from 1970 to 1985, including the bills of rights of new constitutions adopted since 1970, then the scales are tipped toward overall support of rights beyond those required by the federal Constitution.[125] The overwhelming majority of the 300 new federalism decisions listed as of 1986[126] have not inspired any state constitutional amendment.

Twelve of the nineteen amendments listed by Professor Wilkes dealt with preventative detention. The ten states[127] enacting the twelve preventative detention amendments had constitutional provisions guaranteeing the right to bail.[128] Part of the motive for these constitutional amendments may have been state court interpretations of right-to-bail

121. THE BOOK OF THE STATES, *supra* note 100, at 5.

122. Wilkes, *supra* note 108, at 233–35.

123. May, *Constitutional Amendment and Revision Revisited,* 17 PUBLIUS 153 (Winter 1987). It is interesting to compare the relatively small lists of state constitutional amendments relating to individual rights contained in these two articles with the list of new federalism cases compiled by Professor Ronald Collins in 1986. Collins, *Looking to the States,* NAT'L L.J. Sept. 29, 1986, at S-1, S-9–14.

124. May, *supra* note 123, at 171.

125. *Id.* at 174–75.

126. Collins, *supra* note 123, at S-9–14. Collins counts more than 450 such decisions as of 1988. *See* Wermiel, *supra* note 54, at A1, col. 1.

127. Arizona amended the bail provision of its constitution in both 1970 and 1982. ARIZ. CONST. art. II, § 22. In 1982 California amended its constitution through Proposition 4 and the "Victims' Bill of Rights," both of which allow preventative detention. CAL. CONST. art. I, § 12. The remaining eight states are Florida, Michigan, Nebraska, New Mexico, Texas, Utah, Vermont, and Wisconsin. *See* Wilkes, *supra* note 108, at 248 & n.127.

128. *See* Wilkes, *supra* note 108, at 247.

provisions.[129] Nonetheless, no strong correlation exists between a court decision interpreting the right-to-bail provision to prohibit preventative detention and the enactment of an amendment. In fact, most of the states whose courts did issue rulings on the right to bail as prohibiting preventative detention did not react by amending their constitutions.[130]

In contrast, the citizens of a few states have reacted to state court decisions by enacting limiting constitutional amendments. Although not all of the recent cases interpreting state constitutions are in the area of criminal rights, the amendment process has largely targeted those cases. Criminal justice, as these amendments attest, ranks high as a voter concern.[131]

State court decisions on the death penalty and the exclusion of evidence admissible under the federal Constitutiton have inspired a few organized responses to amend state constitutions. In two of the states whose courts found the death penalty unconstitutional under the state constitution, voters passed constitutional amendments reinstating the penalty.[132] In California, the very date of the decision finding the death penalty unconstitutional is preserved in the language of the amendment reinstating it, a perpetual reminder to the courts of the consequences of straying too far from the popular will.[133]

In 1982, in response to several court rulings favorable to criminal defendants, California voters passed "Proposition 8," known as the "Victims' Bill of Rights." One provision amended the California Constitution to admit in criminal trials and proceedings evidence obtained in violation of state constitutional rights or laws.[134] With the exception of evidence rules excluded from its scope,[135] the amendment mandates adherence to federal constitutional guidelines as the only

129. *E.g., In re* Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973); State v. Pray, 133 Vt. 537, 346 A.2d 227, 230 (1975) ("If the constitutional guarantees of bail . . . are in error, then it is up to the people to effect change, since the right to amend the constitution rests solely with the electorate.").

130. *E.g.,* Martin v. State, 517 P.2d 1389 (Alaska 1974); Palmer v. District Court, 156 Colo. 284, 398 P.2d 435 (1965); State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972).

131. Fisher, *supra* note 98; Wilkes, *supra* note 66.

132. CAL. CONST. art. I, § 27 (passed in 1972 in response to People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972)); MASS. CONST. pt. I, art. 26 (passed in 1982 in response to District Attorney v. Watson, 381 Mass. 648, 411 N.E.2d 1274 (1980)); Wilkes, *supra* note 66, at 180–81; Wilkes, *supra* note 108.

133. CAL. CONST. art. I, § 27.

134. *Id.* at § 28(d).

135. Existing evidentiary rules regarding privilege or hearsay are still in effect. *Id.*

standard to determine the admissibility of evidence acquired during police searches. The Victims' Bill of Rights is a major victory by a "law and order faction of the extreme right"[136] against the advance of "new federalism" in California.

Voters in Florida also passed an initiative amending the Florida Constitution to prevent evidence admissible under the federal Constitution from being excluded under the state's search and seizure provision.[137] The Florida amendment is notable in that Chief Justice Burger specifically applauded it in his concurrence to the dismissal of certiorari in *Florida v. Casal*.[138] Chief Justice Burger's statement, with its implication that the Supreme Court has a monopoly on constitutional interpretation leading to "rational" law enforcement, did not sit comfortably with proponents of new federalism.[139] The concurrence in *Casal* is also difficult to reconcile with the Chief Justice's dissent in *Crist v. Bretz*,[140] in which he stated: "We should be cautious about constitutionalizing every procedural device found useful in federal courts, thereby foreclosing the States from experimentation with different approaches which are equally compatible with constitutional principles."[141]

136. Wilkes, *supra* note 66, at 172.

137. "Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under the decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." FLA. CONST. art. I, § 12. Professor Ronald Collins has pointed out that, as with many amendments that attempt to alter constitutional jurisprudence, the amendment reflects inexperienced drafting. Collins, *Government by Popular Initiative: States Amend Their Constitutions*, NAT'L L.J., June 18, 1984, at 14, col. 1.

138. 462 U.S. 637 (1982) (writ of certiorari dismissed as improvidently granted). The Chief Justice wrote:

> The people of Florida have . . . shown acute awareness of the means to prevent . . . inconsistent interpretations of the [federal and state] constitutional provisions.
>
> . . . .
>
> With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement.

Id. at 638–39 (Burger, C.J., concurring in dismissal of certiorari).

139. "Can this mean that the Chief Justice believes the Florida Supreme Court, or any state court, engages in *irrational* behavior when it exercises its ancient and traditional power to extend state constitutional protections beyond those secured by federal law?" Wilkes, *supra* note 108, at 246.

140. 437 U.S. 28 (1978).

141. *Id.* at 39 (Burger, C.J., dissenting).

2. *Election Challenges*

Political action against individual justices has not been used as often as attempts to amend state constitutions as a means of overturning unpopular new federalism decisions. In most states where the courts have been active in independently interpreting their constitutions, neither the electorate nor the legislature has taken action against the writing justice. However, in some circumstances a pattern of decisions by one controversial justice has sufficiently focused the voter attention necessary for a strong popular challenge. Some of these challenges have removed the controversial judge from office; others have been unsuccessful.

a. Rose Bird

California Governor Jerry Brown's appointment of Rose Bird as Chief Justice of the California Supreme Court sparked continuing controversy. In California, appellate judges are appointed by the governor and then are subject to retention votes at twelve year intervals.[142] From the start, the debate about Rose Bird centered on the political aspects of her appointment as the first woman on California's high court and as a liberal former member of Governor Jerry Brown's cabinet.[143] After her confirmation, she faced five unsuccessful recall campaigns against her.

But in the 1986 retention election, Chief Justice Bird's opponents focused on her rulings favorable to criminal defendants.[144] The greatest controversy was her stance on the death sentence. During her term as chief justice, the California Supreme Court overturned nearly every death sentence it reviewed. Bird herself voted to overturn the capital sentence or conviction in every capital case during her tenure.[145] Bird "emerged in the public's perception as the personal symbol of the liberal proclivities of the court."[146] Rose Bird, as well as two other justices the voters identified with her, was ultimately defeated in her retention election.

Justice Bird's defeat may be unique. Because of the extraordinary political factors in her story, it is unlikely that Bird's experience is an

142. THE BOOK OF THE STATES, *supra* note 100, at 157, 163.

143. *See* P. STOLZ, JUDGING JUDGES—THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT 7, 11–12 (1981).

144. Culver & Wold, *Rose Bird and the Politics of Judicial Accountability in California,* 70 JUDICATURE 81, 86 (1986).

145. *Id.*

146. *Id.* at 87.

indicator of the general reaction to justices who take an independent approach to state constitutions.

b. Hans Linde

Justice Hans Linde of the Oregon Supreme Court provides a better example of the correlation between a justice's decision-making on controversial state constitutional issues and vulnerability at election time. Justice Linde has been the foremost state court justice to speak and write, both in law reviews and in judicial opinions, on independent interpretation of state constitutions.[147] His contributions to the national debate on state constitutional law, as well as his leading role in applying the theory of independent review to Oregon Supreme Court decisions, has inspired and guided other state courts.

In 1984, an Oregon circuit court judge and a deputy prosecutor challenged Justice Linde in what was characterized as a "spirited" race for Linde's position on the Oregon court.[148] One of the candidates for the position asserted that Justice Linde "has consistently supported expanded rights for criminal defendants."[149] Justice Linde's opponents were supported by "law-and-order" groups, including a group that sought to amend the Oregon Constitution to restore capital punishment.[150] Oregon voters ultimately reelected Justice Linde by a generous margin.[151]

c. Other Challenges to State Justices

Other state justices active in new federalism have also been successfully reelected. Texas Court of Criminal Appeals Judge Sam Houston, a strong defender of state court independent analysis of the state constitution to protect the criminally accused, overcame such a challenge in 1984.[152] Likewise, Chief Justice John A. Dixon, Jr. of Louisiana

147. *E.g.*, Cooper v. Eugene School Dist., 301 Or. 358, 723 P.2d 298 (1986), *appeal dismissed*, 107 S.Ct. 1597 (1987); State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983), *overrruled in* State v. Owens, 302 Or. 196, 729 P.2d 524 (1986); State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983); State v. Clark, 291 Or. 231, 630 P.2d 810 (1981), *cert. denied*, 454 U.S. 1084 (1981); State v. Scharf, 288 Or. 621, 605 P.2d 690 (1980), *overruled in* State v. Newton, 291 Or. 788, 636 P.2d 393 (1981)); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *supra* note 71.

148. The Oregonian, Oct. 10, 1984, at C5, col. 1.

149. *Id.* at col. 3.

150. N.Y. Times, Apr. 2, 1984, at A17, col. 1.

151. The Oregonian, Nov. 7, 1984, at A1, col. 5.

152. Collins, *supra* note 111, at 32.

was reelected despite a campaign that highlighted his state constitutional law stance on a death penalty case.[153]

These election experiences do not constitute a meaningful statistical sample.[154] There are, however, interesting points of comparison. The resources of the group challenging a justice's reelection is one important factor, as is the role of personalities and politics. There does not, however, appear to be any sure indicator, including a judge's decisions themselves, of how voters will respond. Indeed, the public often ignores the fact that the court's majority signed an unpopular decision and focuses on only one justice.[155] While unpopular decision-making may form the basis of an election challenge to a justice,[156] generally there is low voter interest in judicial elections.[157]

The above accounts, however, represent exceptions to the norm. In most states active in using their own constitutions, voters have not yet mounted campaigns against state court justices applying state constitutional law. Although the reasons for this may be complex, courts are entitled to some extent to consider lack of voter backlash as a democratic validation of their decisions.

3. *Loss of Independence with Democratic Challenges*

Democratic accountability of state appellate court judges does have a reverse side. Where judges are politically accountable, there may be a perception of loss, and possibly an actual loss, of judicial independence. An inevitable tension develops between accountability and independence in the judicial branch.[158] State courts are vulnerable to these tensions, especially where their decisions relate to public controversies.

In both California and Oregon, locations of recent strenuous election challenges to "liberal" incumbent justices, the justices themselves

153. *Id.*

154. As Philip Dubois notes, anecdotes are a poor source of generalizations about judicial elections. P.DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 34–35 (1980).

155. California voters passed over Justice Stanley Mosk, who is identified with expansion of the state constitution to protect rights of the criminally accused, to focus on the politics and policies of Chief Justice Rose Bird and the two other justices seen as her allies.

156. Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections,* 1967 WIS. L. REV. 128, 129–30, 147–54 (discussing challenges to Wisconsin Supreme Court justices in 1964 and 1965 based on unpopular liberal decisions).

157. *See* P. DUBOIS, *supra* note 154, at 36–100.

158. *See, e.g., id.* at 20–28; C. SHELDON, *supra* note 4; Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?,* 64 JUDICATURE 210 (1980); Ladinsky & Silver, *supra* note 156; Thompson, *supra* note 102.

have decried the tone of those challenges as deterring judicial independence.[159] The California Supreme Court suffered more tangibly from the political strife surrounding Rose Bird's appointment and eventual rejection by voters. Before Chief Justice Bird's first retention campaign, the press accused the California court of political motives in delaying publication of already decided opinions, a tactic interpreted as support for Justice Bird.[160] Accusations that a justice deliberately postponed filing a controversial case until after the election ultimately led to an inquiry by the California Commission on Judicial Performance, exposing the inner workings of court decision-making to the public eye.[161]

In sum, an inevitable tension lies between democratic accountability and judicial independence at both the federal and the state level. The challenge is to strike a workable balance for this inevitable tension, to pursue and preserve both of these clearly desirable goals. Many states have increased democratic accountability of their judicial branches, raising issues of judicial independence that normally do not affect federal judges.[162] Whether or not states have found the correct balance between the two competing values, the more democratic nature of the state judiciary can provide positive feedback for assessing state court independent decisions.

IV. STATE COURT CONTRIBUTIONS

The democratic input into judicial decision-making in the states ranges between two extremes. At one extreme is California, with its amendment initiatives and willingness to remove unpopular justices, creating a possible "chill" on judicial independence. New Hampshire, at the other end, appoints each justice for a term that ends on his or her 70th birthday and requires a super-majority legislative and popu-

159. During the campaign against him, Justice Hans Linde stated as follows:

> I think a great disservice to the public is being done by spreading doubt about the quality of our Supreme Court. It is a nationally respected court, and that is in part because it has not been a political court. That has made it possible to maintain a highly respected level of performance.

The Oregonian, Oct. 10, 1984, at C5, col. 1; *see also* Collins, *supra* note 111, at 32 (quoting Justice Linde's concern over "shrill and false attacks on court decisions" that might threaten judicial independence).

160. P. STOLZ, *supra* note 143, at 122–36.

161. *Id.* at 119–91, 267–360.

162. However, even the reduced level of democratic accountability at the federal level has caused concern about its effect on judicial independence. One aspect of the debate on the Bork nomination was whether it was appropriate for the Senate to consider political factors in its ratification decision.

lar vote to amend the constitution.[163] Along this continuum lies an ideal balance of democracy and independence.[164] We can learn much from the various experiences of the states as they struggle with the issues of "new federalism" and the challenges of democratic input.

Justice Brandeis' dissent to *New State Ice Co. v. Liebmann,*[165] much honored by its frequent quotation, states a compelling rationale for independent state analysis: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[166] Although Justice Brandeis was not referring to experimentation in constitutional analysis, time has shown that state courts have acted as experimental laboratories when interpreting their own constitutions. Chief Justice William Rehnquist recently endorsed the application of Justice Brandeis' comments to independent state constitutional analysis, but cautioned: "But I think that those who undertake these 'experiments,' to use Justice Brandeis' term, must be willing to assume the responsibility for doing so."[167]

"New federalism" decisions by state courts can educate the United States Supreme Court on the states' acceptance of expanded individual rights.[168] California Supreme Court Justice Stanley Mosk, a staunch advocate of state court independence in constitutional interpretation, has also pointed out "the ability of the states to innovate and to create new bodies of law, and to experiment."[169] Examples of innovative state court decisions later incorporated by the United States Supreme Court date back to the beginnings of this country. The very notion of judicial review of legislative enactments traces back to state courts.[170] In a previous article, I discussed other examples of state courts developing constitutional analysis later adopted by the United States

163. THE BOOK OF THE STATES, *supra* note 100, at 16, 157, 164.

164. *See* Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role,* 97 HARV. L. REV. 433 (1983).

165. 285 U.S. 262 (1932).

166. *Id.* at 311 (Brandeis, J., dissenting).

167. W. Rehnquist, Remarks of the Chief Justice at the Nat'l Conf. of Chief Justices, Williamsburg, Va. (Jan. 27, 1988) (copy on file with *Washington Law Review*).

168. *See Project Report, supra* note 56, at 290.

169. Unpublished interview with Justice Stanley Mosk, in San Francisco, Calif. (Jan. 24, 1981), *quoted in* Collins, *supra* note 66, at 7.

170. Corwin, *supra* note 26; Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence,* 76 MICH. L. REV. 893 (1978); Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds,* 63 TEX. L. REV. 1025, 1030 (1985).

Supreme Court.[171] These include jurisprudence in the area of due process, the first amendment, eminent domain, the right to bear arms, the exclusionary rule, counsel for indigent defendants, and other rights for the criminally accused.[172]

State courts can contribute to federal constitutional analysis in two ways. The courts can base their decisions on the federal Constitution, using the analytical framework provided by the United States Supreme Court if available, or developing an independent one if not available. Alternatively, state courts can firmly base their decisions on state constitutions and in the process provide analysis that the federal courts might then use in interpreting the federal Constitution.[173] This is the opposite direction that the flow of ideas had taken prior to "new federalism." State courts that independently interpret their constitutions might reject prior United States Supreme Court reasoning as inappropriate even if the language of the state constitutional provision at issue is identical to its federal parallel.[174] This practice presents a true challenge to the Supreme Court that may, along with scholarly and community criticism, result in the Court modifying or qualifying its position.[175] In interpreting the federal Constitution, state and other lower courts cannot directly challenge Supreme Court analyses. Thus, only in state constitutional analysis may the state courts offer their independent insights where the Supreme Court has already ruled on an issue.

The greatest benefits of independent state analysis may occur, however, where the United States Supreme Court has not yet decided an issue. In those cases, state courts relying only on the federal Constitution generally try to infer its probable decision by referring to Supreme Court cases, often resorting to the Court's dicta.[176] However, a state court that applies its own constitution is not burdened with mandatory

171. Utter, *supra* note 170, at 1030–41.

172. *Id.; see also* Douglas, *The Clash Over Constitutions: The Reassertion of State Authority,* 26 JUDGES J. 39, 41 (Summer 1987); Kaye, *Dual Constitutionalism in Practice and Principle,* 61 ST. JOHN'S L. REV. 399, 425–26 (1987).

173. Collins, *Reliance on State Constitutions: Some Random Thoughts,* in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1 (B. McGraw ed. 1985); Collins & Galie, *supra* note 54; Utter, *supra* note 170, at 1029–42.

174. *See* Williams, *State Constitutional Law Processes,* 24 WM. & MARY L. REV. 169, 186 (1983).

175. *See* Kaye, *supra* note 172, at 425–26 & nn.87–91.

176. For example, the Court's dicta in Delaware v. Prouse, 440 U.S. 648 (1979) concerning nondiscretionary roadblocks have been used frequently by state courts attempting to determine whether the Court will find sobriety checkpoints constitutional. Comment, *DUI Roadblocks: Drunk Drivers Take a Toll on the Fourth Amendment,* 19 J. MARSHALL L. REV. 983, 1002–05 (1986).

reliance on Supreme Court precedent. The result reached may also appear to be more justified than the one flowing from federal precedent.

One example from Washington shows how independent analysis can free a state court to reach a conclusion that might differ from the direction suggested by federal Supreme Court dicta. The Washington Supreme Court is committed to what is called the dual sovereignty approach. Under dual sovereignty, courts first address the state constitutional grounds but also evaluate the claim under the federal Constitution.[177] Using this approach in *Seattle v. Mesiani,*[178] the Washington Supreme Court considered the constitutionality of a sobriety checkpoint program established by the Seattle Police Department. The court found that the program violated article I, section 7 of the Washington Constitution,[179] noting that in Washington there is a privacy interest in automobiles. The court also could find no "authority of law" for the searches and seizures.[180]

By resting decisions on state court analysis, cases such as *Mesiani* can provide the United States Supreme Court with an analysis of an issue free of the constraint of attempting to determine how the Court would decide. Of course, the state courts do not operate in a total vacuum. To the contrary, these courts by tradition consider the jurisprudence of federal and other state courts in deciding cases. Federalism allows the state courts to interpret their constitutions independently. The Supreme Court, in following state constitutional decisions, can learn from that independent analysis.

The democratic input into the state system, arguably legitimating state decisions through judicial elections and state constitutional amendments, adds another source of information to the United States Supreme Court. The Supreme Court can also see the repercussions of

177. State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984); *see* Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique,* 20 IND. L. REV. 635, 651–53 (1987); Utter, *supra* note 170.

178. 110 Wash. 2d 454, 775 P.2d 755 (1988).

179. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7.

180. After resting its holding on state constitutional grounds, the *Mesiani* court briefly analyzed the issue under the fourth amendment to the United States Constitution. The Washington Supreme Court's policy is to consider the federal issue even where a case is decided under the state constitution in order to assist other state and federal courts. Seattle v. Mesiani, 110 Wash. 2d 454, 458, 755 P.2d 775, 777 (1988); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984). The Washington Supreme Court concluded that the United States Constitution also barred Seattle's sobriety checkpoint program, in light of the intrusive nature of a search for evidence of intoxication and the lack of a showing of less intrusive means to achieve the city's purposes. *Mesiani,* 110 Wash. 2d at 458–60, 775 P.2d at 777–78.

state court decisions on the states. An interpretation of a state constitution may be felt by the citizens to conflict with deeply held values, and lead them to enact an amendment that precludes that interpretation. Alternatively, if the public ratifies state supreme court decisions by inaction, this may be useful information to the federal Supreme Court in assessing the consequences of its own jurisprudence if it chooses to follow the reasoning of state court decisions.

Popular reaction to state court decisions is inevitable, whether viewed as a positive phenomenon, enlightening the courts on deeply held popular values, or whether seen negatively, threatening judicial independence. If the supporters of unpopular jurisprudence perceive that public backlash stems from misunderstandings of the law, then they may consider how to better educate the public.

Although the ballot may be a tangible disincentive to independent constitutional jurisprudence, as the second quote at the beginning of this article suggests, it has not in fact been so in most state constitutional decisions. State supreme court justices live with the reality that most of them are in some manner accountable to the public about their decisions. This has not generally lessened their fidelity to their oaths of office to support the Constitution of the United States and the constitutions of their respective states. It has, however, made state judges aware of the need to be sensitive to public concerns and to carefully explain why value choices that must be made in decisions are chosen. State judges also frequently participate in public education regarding the role of the courts in a constitutional government. This is part of the ongoing education of the public for the support that judges must give to basic concepts of personal rights contained in the bills of rights of the federal and state constitutions.[181] Constitutional jurisprudence in states across the country and in federal courts will benefit from the fresh analyses used by the independent state courts. Ultimately, both the state courts and the states themselves can be useful

181. The author of an article on the use of amendments to overturn state constitutional jurisprudence aptly summarized the position in which justices in the states find themselves when developing their state constitutional jurisprudence:

> Courts are aware of the institutional constraints under which they must operate. Yet, courts must be careful not to become mere weathervanes of popular attitudes. In the main, the judiciary responds to this antimony by exercising circumspection and restraint. There is, of course, the possibility of excess. Judicial decisions in a particular area of state constitutional jurisprudence may exceed the existing consensus; this sometimes will generate popular dissatisfaction. That this dissatisfaction may be acknowledged and addressed either internally by a state supreme court through doctrinal reformulation or popularly by ballot proposition should hardly cause one to question the underlying vitality of the judicial process.

FISCHER, *supra* note 98, at 88.

experimental laboratories for the development of constitutional jurisprudence by the United States Supreme Court, but can also add democratic legitimation to federal doctrine.

V. CONCLUSION

The reliance on state constitutions as the source of many of our individual rights is part of the historic fabric of the United States. The democratic contributions to the state judicial system add a distinct texture to state court jurisprudence and serve a unique function in contributing to federal constitutional jurisprudence. It remains to be seen how the personalities of the various state courts and state populations will combine in the diversity of state constitutional interpretation. This diversity is inevitable, given the varying language and histories of the state constitutions, the willingness of some state courts to go farther than others in independent jurisprudence, and the differences between states in democratic contributions. Yet this diversity is also desirable. It widens the range of constitutional analysis and allows the results of each state's experimentation to benefit all other courts, federal as well as state.