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Denver Law Review

Volume 63 | Issue 1 Article 12

February 2021

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Paul S. Hudnut, State Constitutions and Individual Rights: The Case for Judicial Restraint, 63 Denv. U. L. Rev. 85 (1985).

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State Constitutions and Individual Rights: The Case for Judicial Restraint

Paul S. Hudnut*

Introduction

State constitutions were originally the only source of protection against the states' authority. However, as major portions of the Bill of Rights were incorporated into the fourteenth amendment, the United States Constitution increasingly assumed a dominant role in protecting individual rights from state actions and the role of state constitutions as an independent source of constitutional protection became submerged. State courts either construed state constitutions to be coextensive with the federal Constitution or ignored the state constitutions altogether.

In the past decade, there has been a dramatic rebirth of state constitutional law. No longer do state courts defer to federal interpretations of the United States Constitution in construing similar provisions in their own constitutions; rather, they often give their state constitutions an independent life, thereby insulating their decisions from United States Supreme Court review.[1] Both commentators and judges have viewed this development favorably.[2] Moreover, the trend appeals to both liberal and conservative philosophies: liberals see it as a means of avoiding restrictive interpretations by the Burger Court and expanding individual rights, while conservatives believe that the reemergence of state constitutions is healthy for our federal system and reasserts the power of the states in our union.[3]

There are, however, troubling aspects to this development which

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1. *See, e.g.*, Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982); State v. Opperman, 247 N.W.2d 673 (S.D. 1976). When based on an adequate and independent state ground, a case which also decides federal questions will not be reviewed by the United States Supreme Court. Michigan v. Long, 463 U.S. 1032 (1983). *See infra* notes 16-19 and accompanying text.

2. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *E Pluribus-Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) [hereinafter cited as *Developments in the Law*]. In fact, some state courts have stated that lawyers who fail to raise state constitutional claims are "skating on the edge of malpractice." Bamberger, *Boosting Your Case with Your State Constitution*, A.B.A. J., March 1, 1986, at 49 (quoting Oregon Supreme Court Justice Hans Linde).

3. For the liberal view, see Brennan, *supra* note 2; *Rights Advocates Shifting Tactics to Fight Reagan*, L.A. Daily J., Nov. 16, 1984, at 1, col. 6 (American Civil Liberties Union Legal Director states that the Union plans to use state courts to protect individual rights in light of the increasingly conservative federal judiciary). For the conservative view, see Roberts, *The Adequate and Independent State Ground: Some Practical Considerations*, 19 LAND & WATER L.

have gone largely ignored. Different levels of constitutional protection in each of the fifty states may create difficult problems for law enforcement officials and an appearance of unfairness where different results occur in similar situations. The issue of what remedies are available for violations of recently expanded state constitutional rights has not been addressed, and the implications for federalism have not been fully developed. This article surveys the problems caused by the expansion of state constitutional protections beyond the protections of corresponding provisions of the United States Constitution, and suggests that due consideration of these problems should lead state courts to be cautious in expanding constitutional rights beyond those rights provided by the federal Constitution. The article then discusses the role of state constitutional protections in the federal system and proposes a framework for deciding when state courts should broaden constitutional protections under state constitutions.[4]

I. THE EMERGENCE OF STATE CONSTITUTIONS AS SOURCES OF PROTECTION FOR INDIVIDUAL RIGHTS

A. *The Historical Context*

In the early days of the American Republic, only state constitutions, and the rights guaranteed thereunder, protected citizens from actions by state governments.[5] These state constitutional rights preceded the federal Constitution and the framers of the United States Constitution considered such rights to be so complete that a federal "Bill of Rights" was not added until several years after the Constitutional Convention of 1787.[6] The federal Bill of Rights was based on provisions of earlier state constitutions and limited only the powers of the new federal government.[7]

A gradual evolution of constitutional protections, however, began with the ratification of the fourteenth amendment following the Civil War. Although initial United States Supreme Court interpretations indicated a narrow application for the new amendment,[8] the fourteenth amendment was subsequently found to incorporate substantially all of the federal Bill of Rights, thus making these protections applicable to

REV. 647 (1984) (discussing the importance of adequate and independent state grounds as rules of decision).

4. This article does not attempt to be an exhaustive study of state court decisions which diverge from federal constitutional interpretation. For such a discussion, see Howard, *supra* note 2; *Developments in the Law*, *supra* note 2.

5. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). This view of the respective roles of the federal and state constitutions remained for many years following the ratification of the fourteenth amendment. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).

6. *See Developments in the Law*, *supra* note 2, at 1327.

7. *Id.* at 1326-29. People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1112, 119 Cal. Rptr. 315, 329 (1975).

8. Hurtado v. California, 110 U.S. 516 (1884); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

the states.[9] As these federal rights were being gradually incorporated into the fourteenth amendment, they were concurrently being defined by the United States Supreme Court.[10] From the decision in *United States v. Gitlow*[11] through the years of the Warren Court, the protections of the first, fourth, fifth, sixth and eighth amendments were not only expanded to encompass the actions of state governments, but were expanded to provide greater substantive rights as well.[12]

As federal constitutional rights were expanded and made applicable to the states, state constitutional protections fell into disuse. This may be attributed to several factors. First, because incorporated federal rights became a constitutional "minimum" for states and were often more expansive than existing state constitutional rights, state courts were unlikely to provide even broader protections so soon after the expansion of substantive rights available under the federal Constitution.[13] The liberality of the Supreme Court in comparison with its state counterparts may also have been a factor because many state courts may have viewed the federal "minimum" as granting too much protection. Finally, with the expansion of federal rights, the attention of litigants, commentators and law schools was on the federal Constitution, and state constitutions were viewed as redundant sources of constitutional protection.[14] As a result of these factors, state constitutional rights were overshadowed by federal constitutional rights and, on the rare occasions when state rights were considered, they were held to be coextensive with the federal guarantees.[15]

In the last decade, however, state constitutions have reemerged as important sources of individual protections. As the Burger Court has embarked on a more conservative path than its immediate predecessors, litigants and judges have begun to look at state constitutions as sources of more expansive rights than those available under the federal Bill of Rights.

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9. *See, e.g.*, Wolfe v. Colorado, 338 U.S. 25 (1949) (incorporating fourth amendment protections); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating first amendment protections).

10. *See* Brennan, *supra* note 2, at 493-95.

11. 268 U.S. 652 (1925).

12. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

13. One commentator has suggested that "[d]uring the activist Warren years, it was easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law." Howard, *supra* note 2, at 878. It should not be surprising from an institutional view that state constitutions were largely ignored. Due to the supremacy clause, state constitutions can only expand on those rights guaranteed by incorporated federal constitutional rights. *See infra* note 15. Thus, when the court which defines federal rights is more activist or liberal than its state counterparts, state constitutions are likely to be ignored because the federal right will be defined more broadly than the state courts would be willing to go with state rights. Conversely, when the court defining federal rights is more conservative than some of its state counterparts, state constitutions become more important, as federal rights are viewed as being "too narrow."

14. *See* Linde, *supra* note 2, at 166, 174.

15. *See, e.g.*, Commonwealth v. Platou, 455 Pa. 258, 260 n.2, 312 A.2d 29, 31 n.2 (1973) ("Our discussion of the Fourth Amendment is equally applicable to the state constitutional provision."), *cert. denied*, 417 U.S. 976 (1974).

B. *Adequate and Independent State Grounds and the Supremacy Clause: Federal Constraints on State Constitutional Interpretation*

The degree to which state courts may interpret state constitutions differently from federal constitutional precedent is governed by the interaction of the adequate and independent state grounds doctrine and the supremacy clause. Under the doctrine of adequate and independent state grounds, state court decisions which rest upon an adequate state ground will not be reviewed by the United States Supreme Court.[16] The supremacy clause,[17] however, limits the use of this doctrine because state law may not conflict with federal law. Thus, if state constitutional rights fall below the federal constitutional protections incorporated in the fourteenth amendment, they will be preempted by the supremacy clause.[18] As a result of this interplay between the doctrine of adequate and independent state grounds and the supremacy clause, state constitutional interpretation is skewed: state provisions may only be interpreted to provide broader protections than similar provisions of the United States Constitution.

The doctrine of adequate and independent state grounds is a constitutional limit on the United States Supreme Court's jurisdiction: the Court has no jurisdiction to review a state decision which is adequately based on state grounds.[19] This doctrine primarily serves federalism concerns because it expressly recognizes the separation of federal and state law and prevents federal courts from determining matters of state law solely because a federal issue is also present.[20] As a result of this doctrine, state decisions which extend protections beyond those provided by the federal Constitution will be respected by the federal courts and will not be subject to review even if the case also raises federal con-

16. The adequate and independent state grounds doctrine had its origins in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). A recent articulation of the doctrine may be found in Michigan v. Long, 463 U.S. 1032 (1983).

17. The supremacy clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

18. Under the supremacy clause, state laws may not conflict with the federal Constitution. Thus, federal law sets a constitutional minimum below which a state law may not fall. However, state courts may expand rights under state constitutions beyond the federal constitutional minimum, as long as one's state constitutional rights do not infringe upon another's federal constitutional rights. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

19. If adequate and independent state grounds exist, there is no case or controversy as to any federal question and the federal courts are without jurisdiction. U.S. CONST. art. III, § 2. It has been settled since Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 616 (1875) that the United States Supreme Court will not review decisions of state law by state courts, although the basis for that holding was the Court's interpretation of The Judiciary Act of 1789 and not the Constitution. *See Developments in the Law*, *supra* note 2, at 1332-33.

20. Note, however, that federal district courts determine state law issues regularly under diversity and pendent jurisdiction. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (state claim decided by federal court under pendent jurisdiction); 28 U.S.C. § 1332 (1982) (diversity jurisdiction statute).

stitutional issues.[21]

In addition to requiring that states, at a minimum, provide protections at least equal to federal constitutional requirements, the supremacy clause has two other effects on state constitutional interpretation. First, expansive state constitutional interpretations may not interfere with the exercise of federal constitutional rights.[22] Second, additional state constitutional protections presumably will not apply to federal entities.[23] Thus, the Federal Bureau of Investigation would not be bound by stricter state search and seizure requirements than those required by the United States Constitution.

The interplay between the doctrine of adequate and independent state grounds and the supremacy clause defines the universe in which state courts are free to interpret their state constitutions. The doctrine of adequate and independent state grounds ensures that federal courts will not interfere with the state courts' freedom to establish state law, while the supremacy clause ensures that the state courts will not inter-

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21. Michigan v. Long, 463 U.S. 1032 (1983). This case clarified the test for determining whether a state court decision rests on adequate and independent state grounds. In *Long*, the Court reviewed a decision of the Michigan Supreme Court which had reversed the conviction of the defendant on the grounds that certain evidence had been illegally seized. People v. Long, 419 Mich. 636, 359 N.W.2d 194 (1984). The state decision cited the Michigan Constitution and federal case law, but it was unclear upon which ground the decision rested.

Justice O'Connor, writing for the United States Supreme Court's majority, rejected the contention that the decision below rested on state law and used the occasion to set out principles for determining when a state's decisional ground was adequate and independent. The Court stated that

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

463 U.S. at 1040-41. To avoid the presumption that the decision rests on federal grounds, the state court "need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Id.* The Court then restated the traditional doctrine that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.*

For examples of "plain statements" by state courts, see State v. Bolt, 142 Ariz. 260, 689 P.2d 519, 524 (1984) ("The holding with respect to the Arizona Constitution is based upon our own constitutional provision, its specific wording, and our own cases, independent of federal authority."); People v. Timmons, 690 P.2d 213, 217 (Colo. 1984) (earlier decisions diverging from federal precedent "rest solely and explicitly" on the state constitution).

22. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

23. The federal courts have yet to face the issue of whether stricter state constitutional rules will apply to federal agencies. In other areas, however, the United States Supreme Court has held that the states may not regulate federal agencies so as to interfere with federal programs or policies. *See, e.g.*, Sperry v. Florida, 373 U.S. 379, 402 (1963) (state maintains control over patent practices except to the extent necessary for the accomplishment of federal objectives); Mayo v. United States, 319 U.S. 441, 445 (1943) ("the activities of the Federal Government are free from regulation by any state"). It is likely, therefore, that a similar supremacy clause analysis would be applied to more exacting state constitutional rules.

fere with the exercise of an individual's rights under federal law.[24] Under this framework, state courts enjoy great freedom to interpret their constitutions as they wish, and they have been using this freedom with increased frequency.[25] In many areas of constitutional law, most notably criminal procedure and freedom of expression, states have recently provided more expansive rights under state constitutions.[26]

II. Problems Created by State Court Divergence from Federal Constitutional Precedent

The trend toward increased reliance on state constitutions has been largely applauded.[27] However, when state courts differ from federal constitutional precedent, several problems may result. This section analyzes the problems which may occur when federal and state constitutional interpretations differ. Section III then proposes a framework for determining when it is most appropriate for state courts to hold that

24. In addition to the supremacy clause, there are important political checks on state courts. State initiatives allow voters to overrule unpopular constitutional interpretations. *See* CAL. CONST. art. 1, § 27 (1879, amended 1972) (an initiative by the people of California which amended the state constitution to overrule People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972) and reinstated capital punishment). *Compare* District Attorney for Suffolk Dist. v. Watson, 381 Mass. 648, 411 N.E.2d 1274 (1980) (declaring capital punishment statute unconstitutional) *with* MASS. CONST. Part 1, art. 26 (1780, amended 1982) ("No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death."). Moreover, it is often less difficult for legislatures to amend state constitutions than it is for Congress to amend the federal Constitution. Howard, *supra* note 2, at 939. It should also be noted that in many states, judges are elected or subject to "approval" votes. *Developments in the Law*, *supra* note 2, at 1351.

Such political checks, however, may not always be an effective limit on activist state courts. *See* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME LAW. 1118, 1126-28 (1984) (discussing the possibility of an "unreviewable state judgment" where a state court's reliance on both federal and state constitutions results in "uncertainty about the accuracy of the state supreme court's interpretation of federal law . . . [which] may deter state constitutional amendment"). It should also be noted that the amendment process for state constitutions is burdensome and that it would be difficult to utilize that process every time a state court made an expansive definition of constitutional rights under the state constitution.

25. According to one commentator, every state has now utilized its constitution to expand protections beyond those provided by the United States Constitution. Roberts, *supra* note 3, at 648.

26. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (rejecting United States Supreme Court's holding in Hudgens v. N.L.R.B., 424 U.S. 507 (1976) that there was no right under the first amendment to solicit signatures for political petitions at private shopping centers), *aff'd*, 447 U.S. 74 (1980); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (rejecting United States Supreme Court's holding in Harris v. New York, 401 U.S. 222 (1971) that a statement obtained in violation of an individual's *Miranda* rights was admissible for impeachment purposes); People v. Sporleder, 666 P.2d 135 (Colo. 1983) (rejecting United States Supreme Court's holding in Smith v. Maryland, 442 U.S. 735 (1979) that pen registers do not violate a person's fourth amendment rights); Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590 (1983) (same holding as *Robins*); State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (holding that an inventory search held to be permissible under the fourth amendment by the United States Supreme Court violated the South Dakota constitution).

27. *See supra* notes 2-3.

state constitutional provisions provide greater protections than their federal counterparts.

A. *Uniformity*

The United States Supreme Court has often stressed the desirability of uniform interpretations of federal law.[28] Uniformity between state and federal constitutional interpretations is also desirable, unless there are valid reasons for differences. To assert that uniformity between state and federal law is desirable is somewhat novel. The conventional wisdom was perhaps best expressed by Justice Brandeis when he stated: "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."[29] While this may well be true in many areas of law, it is not necessarily true in the area of constitutional law.[30] There are several arguments for uniformity of state and federal constitutional law. First, there is the possibility of different results in similar cases. Although this is often the case among various jurisdictions with regard to common and

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28. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040 (1983); *see also* Schlueter, *Judicial Federalism and Supreme Court Review of State Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME LAW. 1079, 1099 (1984).

29. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This statement is often cited in support of state court experimentation. *See, e.g.*, Howard, *supra* note 2, at 940 ("While [Justice Brandeis] had in mind experimentation by legislatures, the same reasoning supports innovation and diversity among state courts."); *see also* California v. Carney, 105 S. Ct. 2066, 2073 n.7 (1985) (Stevens, J., dissenting) ("[s]ome conflict among state courts on novel questions . . . is desirable as a means of exploring and refining alternative approaches to the problem"). This author is not as certain as Professor Howard or Justice Stevens that such is the case. As Professor Howard notes in his article, judges are not subject to the same majoritarian political checks as legislators. Howard, *supra* note 2, at 941. Moreover, Justice Brandeis addressed "social and economic" experiments, not constitutional experiments regarding the relationship between individual liberty and state actions. As argued throughout this article, constitutional experimentation should be undertaken carefully and with restraint. Finally, Justice Brandeis' statement assumes that such experiments will be "without risk to the rest of the country." As discussed later in this article, some state constitutional rights may have effects outside state boundaries because they either conflict with other states' constitutional rights or impede law enforcement. *See infra* notes 72-88 and accompanying text.

30. Some state courts have been responsive to the need for uniformity between state and federal constitutional protections. *See* State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984) where the court noted:

> It is poor judicial policy for rules governing the suppression of evidence to differ depending upon whether the defendant is arrested by federal or state officers. Therefore even though on occasion we may not agree with the parameters of the exclusionary rule as defined by the United States Supreme Court, we propose, so long as possible, to keep the Arizona exclusionary rule uniform with the federal.

Id. at 528.

Some members of the United States Supreme Court have also indicated that uniformity between state and federal constitutional law is desirable. *See* Colorado v. Nunez, 465 U.S. 324 (1984) (where three Justices concurred in dismissing certiorari, but wrote a separate opinion stating that the result reached by the state court was not the result required by federal law). One commentary has indicated that *Nunez* is a signal that certain members of the Court may become more active in disregarding purported adequate and independent state grounds where it appears that these grounds are "a mere guise to avoid federal precedent." Erickson & Neighbors, *Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field 1983-84*, 13 COLO. LAW. 1561, 1617 (1984).

statutory law, such varying results appear more repugnant or unfair in the constitutional area, especially in the criminal area.[31] A second related argument is that bright lines are needed in constitutional law because it is this law which protects individual liberties from government interference. Thus, where state and federal constitutional laws differ, there will be less certainty as to which laws apply to whom and individuals will be less certain of the consequences of their actions.[32]

As discussed, state constitutional law is skewed by the supremacy clause: states may only *expand* on individual rights; they may not contract on those rights which are guaranteed by the federal Constitution. Therefore, a lack of uniformity will only occur when state constitutions offer more protection than offered by the federal Constitution. Justice Brennan argues that such "double protection" of individual liberties is a beneficial product of federalism,[33] but it is troubling that such double protection will result in different constitutional rights for citizens of different states.[34] For instance, assume state *X* has held, in accord with the United States Supreme Court, that a warrantless inventory search of an automobile by police is a reasonable search and seizure under the state constitution. In addition, state *X* has a capital punishment statute. A neighboring state, *Y*, has declined to follow such a federal rule and has held capital punishment to violate state constitutional prohibitions of cruel and unusual punishment. Assume that identical crimes were committed in both states, and in both cases, the murder weapon was found during an inventory search of a car. In such a situation, it is entirely possible that the defendant in state *X* would be executed while the defendant in state *Y* would be set free. This is not to say that different states would always reach the same results in similar cases if constitutional rules were uniform, but it points to the increased disparity that will result if state courts diverge from federal constitutional precedent. Moreover, such disparity will reinforce the popular perception of the legal system being capricious, hyper-technical, and unfair. To many, consistency is viewed as a virtue in the law. Having the interpretation of one's constitutional rights depend on which state one is in is at odds with this popular conception of immutable constitutional rights.[35]

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31. *See infra* text accompanying notes 33-35.

32. The uncertainty affects both police and prosecutors who would prefer brighter lines in the criminal procedure area and protestors who would prefer brighter lines in the area of first amendment rights so that they may avoid criminal sanctions.

33. Brennan, *supra* note 2, at 503.

34. *See* State v. Hunt, 91 N.J. 338, 341, 450 A.2d 952, 955 (1982) ("Divergent interpretations are unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same."); Lipson, Serrano v. Priest, I and II: *The Continuing Role of the California Supreme Court in Deciding Questions Arising Under the California Constitution*, 10 U.S.F.L. REV. 697, 721 (1976) ("In an age of ever increasing technology and mobility, the American people may find it 'curiouser and curiouser' that conceptions of their fundamental rights should change dramatically when they merely cross a state line.").

35. *See* State v. Hunt, 91 N.J. 338, 341, 450 A.2d 952, 955 (1982) ("[E]nforcement of criminal laws in federal and state courts, sometimes involving identical episodes, encourages application of uniform rules governing search and seizure. Divergent interpretations are unsatisfactory from the public perspective. . . ."); *see also* Lipson, *supra* note 34. At the

A second argument for uniformity is that uncertainty will result where state and federal interpretations of constitutional protections differ. Prosecutors and police need to know the rules of the game. More expansive state protections will not apply to federal agencies such as the Federal Bureau of Investigation or the Drug Enforcement Agency.[36] As stated by one Oregon Supreme Court justice: "Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or a state prosecution or both. In these instances, two different rules would cause confusion."[37] Moreover, regional law enforcement projects, such as drug investigations, could become much more difficult if search and seizure rules, confession rules, and other rules of criminal procedure vary in each of the states.[38]

B. *Remedies*

Another problem created by state court divergence from federal constitutional law is one of remedies. Section 1983 of the United States Code is unique to federal law; there are no state counterparts.[39] Thus, where the state court finds broader protection under a state constitution, the right may be in many cases only an illusory one. For example, Massachusetts recently found a constitutionally protected liberty interest for a non-institutionalized mentally incompetent person to refuse

theoretical level, justice may be getting the "right result," but many equate justice with achieving similar results under similar situations. *See* Thibaut & Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979).

36. *See supra* note 23 and accompanying text.

37. State v. Lowry, 295 Or. 337, 346, 667 P.2d 996, 1005 (1983) (Jones, J., concurring) (quoting State v. Florance, 270 Or. 169, 184-85, 527 P.2d 1202 (1974)).

As an example, Massachusetts recently decided to retain the *Aguillar/Spinelli* test for probable cause, a test which was rejected by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213 (1983). Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985). Thus, in Massachusetts, there is "state probable cause" and "federal probable cause." When an anonymous informant notifies law enforcement officers of facts which indicate that an individual is violating both federal and state law, a situation may ensue where a warrant based on the informant's statement would be supported by "federal" probable cause but not "state" probable cause. Confusion and inefficiency may well result.

38. *See* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 994-95 (1979).

39. 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color . . . (state law) subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 is the primary method of recovering damages for the violation of federal rights by state and local officials, and such cases are being filed with increasing frequency. In 1960, approximately 300 civil rights actions were filed. J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTIONS § 1.33 at 1-485, n.36 (1984). In 1984, over 21,000 civil rights actions were filed, plus an additional 18,800 prisoner petitions alleging civil rights violations. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1984 ANNUAL REPORT OF THE DIRECTOR 254, table C2. These 39,000 cases constitute roughly 15 percent of the federal district court caseload of 261,000 cases. *Id.* at 253, table C2.

treatment with anti-psychotic drugs.[40] If state employees violate this state created right, assuming there is no parallel federally protected right,[41] what is plaintiff's remedy? At equity, the individual could obtain an injunction against future injections. But can the individual recover damages? Perhaps tort law would provide a remedy, but such action may be barred by sovereign immunity or other limitations.[42] In all likelihood, to adequately protect the right it has created, a state court would have to imply a remedy[43] or be satisfied at having created a right without a remedy. Although there are remedies for constitutional violations other than damages,[44] proponents of state court divergence should not ignore the tremendous number of § 1983 damage actions used to remedy violations of federal constitutional rights.[45] Without a damages remedy for those instances in which state officials have violated state constitutional guarantees, such guarantees are without substance for many litigants.

The propriety of implying remedies from state constitutions is also questionable. Implied remedies, from either federal or state constitutions, have none of of the limitations which have been developed in § 1983 actions.[46] Thus, divergence from federal constitutional precedent will involve another cost: developing a body of jurisprudence on the limits of implied remedies under state constitutions. Moreover, implied remedies place a court in a quasi-legislative role; certainly, the argument can be made that the issues of remedies should be left to state legislatures.[47]

The final concerns about remedies relate to criminal proceedings. When a state has adopted broader constitutional protections, what happens when there is a federal criminal proceeding in which the defendant believes he faces irreparable injury and that his state rights are endan-

40. Guardianship of Roe, 383 Mass. 415, 421 N.E.2d 40 (1981).

41. *See* Mills v. Rogers, 457 U.S. 291 (1982), *remanded sub nom.*, Rogers v. Okin, 738 F.2d 1 (1st Cir. 1984).

42. In the hypothetical case discussed, a plaintiff might sue the state in tort for battery. In some states, though perhaps not Massachusetts, the suit may be barred by the doctrine of sovereign immunity. *See* PROSSER & KEETON, THE LAW OF TORTS § 131 (5th ed. 1984). Moreover, both the elements and defenses which must be proven will be different. In battery, a plaintiff must show offensive contact with his person by the defendant, *id.* § 9 at 39, while the gravamen of a constitutional complaint would be that the plaintiff's constitutional rights, not his person, had been violated by state officials. *See* State v. Bolt, 142 Ariz. 260, 689 P.2d 519, 527 (Ariz. 1984) (discussing alternative remedies to the exclusionary rule, including damages actions in tort for invasion of privacy or for outrage).

43. Implied constitutional remedies have been found under the federal Constitution. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

44. Constitutional violations may be remedied by injunction, *see, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908), or by exclusion of unconstitutionally obtained evidence, *see, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

45. *See supra* note 39.

46. For example, are there absolute or qualified immunities to implied causes of action, as there are in § 1983 actions? Harlow v. Fitzgerald, 457 U.S. 800 (1982).

47. *See infra* notes 65-67 and accompanying text; *see also* Deukmejian & Thompson, *supra* note 38, at 999-1002 (criticizing the California Supreme Court for assuming legislative functions).

gered? May a state court grant an injunction against the federal criminal proceeding under a theory similar to that allowed to defendants in state proceedings in *Younger v. Harris*?[48] Similarly, if a defendant has been convicted in a federal criminal proceeding, can he file a habeas corpus petition claiming that he is being imprisoned in violation of his state constitutional rights? Although the answers to these questions are not entirely clear, it is likely that these actions would be barred.[49]

C. *Federalism*

Some advocates of state court divergence feel it is a healthy aspect of federalism and a revitalizing trend for the states' judiciaries.[50] While it is true that the reassertion of a state's independence is healthy, these advocates ignore some potentially damaging aspects of divergence on the federal system.

Most damaging is the adverse effect that unprincipled state court decisions have on federalism. Too often the adoption of a different rule under the state constitution is inspired by disagreement with the United States Supreme Court's interpretation of the federal Constitution.[51] When a state court diverges from federal constitutional precedent solely because of a political or policy disagreement with the United States Supreme Court, it weakens the federal system. It signals a lack of respect by state court judges for precedent and the United States Supreme Court, and appears unseemly, result-oriented, and unprincipled.[52]

48. 401 U.S. 37 (1971). In *Younger*, the United States Supreme Court reaffirmed that an injunction against pending state criminal proceedings would not be issued absent evidence of bad faith prosecution against the defendant. Where, however, state proceedings have not been brought, but an individual legitimately feels threatened by a criminal proceeding to the extent that he can allege he will suffer irreparable injury, he may seek injunctive relief in federal court. *Id.* at 48.

49. It is unlikely that a state court could enjoin a federal criminal proceeding. *See* General Atomic Co. v. Felter, 434 U.S. 12 (1977); Donovan v. City of Dallas, 377 U.S. 408, 413 (1964) (a civil case which held that "state courts are completely without power to restrain federal-court proceedings in *in personam* actions . . ."). As to the habeas corpus petition, it would be unlikely to succeed, as it is likely that such an action would violate the supremacy clause. *See General Atomic*, 434 U.S. at 15 (stating that a state court injunction prohibiting a party from litigating in federal court conflicted with the supremacy clause). *See also supra* notes 22-23 and accompanying text.

50. *See* Brennan, *supra* note 2; Roberts, *supra* note 3.

51. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 109, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) (holding that a decision of the United States Supreme Court was "not persuasive authority"); People v. Sporleder, 666 P.2d 135, 142 n.6 (Colo. 1983) (where the Colorado Supreme Court stated that it found a decision of the United States Supreme Court "unconvincing").

52. *See, e.g.*, State v. Hunt, 91 N.J. 338, 349, 450 A.2d 952, 963 (1982) (Handler, J., concurring) ("There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach."); Bator, *The State Courts and Federal Constitutional Rights*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) ("I must confess some misgivings about the extent to which some . . . commentary seems to assume that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory."); Deukmejian & Thompson, *supra* note 38, at 1009 (criticizing California Supreme Court for being "result-oriented" and noting that such opinions undermine the bar's and the public's confidence in a court's decisions).

State court activism has also resulted in similar "unseemly" behavior by the United States Supreme Court as evidenced by recent decisions of that tribunal. The Court has been accused of "reaching out" to find federal grounds for decisions,[53] rendering advisory opinions,[54] and refusing to remand cases to state courts.[55] While principled divergence from federal precedent is a healthy aspect of our federal system, unprincipled divergence undercuts the cooperative aspect of the system.[56] Interpretations of the United States Constitution by the United States Supreme Court are entitled to respect and deference by the state courts, and such persuasive authority should not be lightly disregarded.

Moreover, although it is unlikely that there will be a major shift of constitutional litigation to more "liberal" state courts, it seems that more of such cases will be brought in such state courts. Thus, state courts should realize that as they extend constitutional protections, they will be increasing the demands on their judicial systems.

The emergence of different state constitutional rules will increasingly require federal courts to determine state constitutional law. Litigants in federal court asserting federal constitutional claims will now also assert claims based on similar state provisions. While such issues arise under pendent or diversity jurisdiction,[57] and the federal courts clearly have the jurisdiction to decide them, a strong argument can be made that federal courts should abstain from making such determina-

53. *See* Michigan v. Long, 463 U.S. 1032, 1065-72 (1983) (Stevens, J., dissenting).

54. *See* Colorado v. Nunez, 465 U.S. 324 (1984) (Stevens, J., concurring). Apparently, Justice White's advisory opinion was written so that other courts would not confuse the Colorado rule and the federal rule on the disclosure of an informant's identity. One commentary has indicated that the opinion signals that the Court may become more active in disregarding purported adequate and independent state grounds where it appears that these grounds are "a mere guise to avoid federal precedent." Erickson & Neighbors, *Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field 1983-84*, 13 COLO. LAW. 1561, 1617 (1984).

Note also the requirement in *Long* that an adequate and independent state ground be "bona fide." 463 U.S. at 1042. Such a requirement may be another means by which the Supreme Court could control state courts which it thought too "active." Thus, if a state court diverges from federal precedent for unprincipled policy reasons, the United States Supreme Court could assert jurisdiction on the ground that the state decision was not "bona fide." This raises a disturbing spectre of the state court being reversed on state law because the United States Supreme Court found the decision to be a bad faith effort to avoid federal precedent. Whether the United States Supreme Court could assert such jurisdiction and whether the state would be bound by the reversal raises issues beyond the scope of this article.

55. *See* Roberts, *supra* note 3, at 651-52. In the past, it was common to remand a state case to the state court, Oregon v. Hass, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting), but recently the Court has reversed without remand. *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420 (1984); Oregon v. Hass, 420 U.S. 714 (1975). This may be the Court's way of preventing a state court, upon remand, from reinstating its original holding by substituting state grounds. It is unclear whether this method will avoid such state court responses. In New York v. Belton, 453 U.S. 454 (1981), *on remand*, 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982), the New York Court of Appeals treated such a reversal as a remand, but held that state law compelled the same result as that reached by the United States Supreme Court.

56. State v. Hunt, 91 N.J. 338, 350, 450 A.2d 952, 964 (1982) (Handler, J., concurring) ("a considerable measure of cooperation must exist in a truly effective federalist system").

57. *See supra* note 20.

tions.[58] Recently, the United States Supreme Court stated that "abstention is not required for interpretation of . . . state constitutional provisions" which "parallel" the federal Constitution.[59] However, where state courts have previously diverged from federal precedent in interpreting state constitutional provisions, abstention may be proper, as interpretation of the state constitution would avoid the necessity of reaching a federal constitutional issue.[60] Thus, when a federal court is presented with claims that a litigant's state and federal constitutional rights have been violated, it would be a proper exercise of discretion to abstain from deciding the case when the state claim is based on a constitutional provision which has been subject to a different interpretation than a similar federal provision.[61] Thus, a side effect of divergent state court decisions may be to deny litigants a federal forum unless they are willing to sacrifice or delay their state law claims.[62] Divergence from federal precedent, therefore, may increase the caseload of the state courts and result in judicial inefficiency. Both federal and state courts may need to become involved in a case that a federal court could have decided entirely on its own were it not for the possibility of a different interpretation of the state constitution.

58. It should also be noted that even if federal courts choose not to abstain from deciding state constitutional issues, their power to grant relief for violations of state constitutional rights is limited. In Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), the United States Supreme Court held that the eleventh amendment bars federal courts from ordering state officials to comply with state law. Thus, injunctive relief for violation of expanded state constitutional rights may not be provided by federal courts. *See* Rogers v. Okin, 738 F.2d 1, 3-4 (1st Cir. 1984).

59. Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321, 2327 n.4 (1984). In *Midkiff*, however, the state constitutional provision, which parallels the fifth amendment "takings clause," had not been interpreted differently from the fifth amendment. A different case would present itself if a litigant in Federal District Court for South Dakota raised a constitutional claim under South Dakota's parallel provision to the fourth amendment because South Dakota has diverged from the federal interpretations of the fourth amendment's "illegal search and seizure" on several occasions. *See, e.g.*, State v. Opperman, 247 N.W.2d 673 (S.D. 1976). In such a case, there is an "uncertain question of state law" which may be "subject to an interpretation which will render unnecessary" or substantially modify the federal constitutional question, *Midkiff*, 104 S. Ct. at 2327, thus presenting a proper case for abstention.

60. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

61. The grounds for abstention could be either the *Pullman* type, where an unsettled question of state law may render the federal constitutional issue unnecessary, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), or the "comity" type, where a state constitutional law is a "matter . . . largely of local concern and which [is] within the special competence of local courts." International Bhd. of Elec. Workers-Local 1245 v. Public Serv. Comm'n, 614 F.2d 206, 212 n.1 (9th Cir. 1980). *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943); *see also* Mills v. Rogers, 457 U.S. 291, 305-06 (1982).

62. If the case is sent to state court, the litigants will eventually get a federal hearing on an asserted federal claim once they have exhausted state appeals and applied for certiorari to the United States Supreme Court. There may be other reasons for preferring federal court, however, such as certain rules of procedure or evidence or the convenience of the parties. Abstention in such cases would certainly undercut pendent and diversity jurisdiction, as litigants would be forced to abandon state claims in order to stay in federal court, or would be forced to abandon federal court to maintain their state claims.

D. *Institutional Accountability*

Another disturbing aspect of state divergence is a danger which affects the federal bench as well: judicial review is often a countermajoritarian exercise. This problem is aggravated when state constitutions are interpreted to provide broader protections than those afforded by the federal Constitution. Decisions in which state courts strike down legislative acts which satisfy federal constitutional requirements should not be undertaken lightly.[63] Although there may be more political checks on state judges than on their federal counterparts,[64] state judges would do well to remember that "judicial review . . . is never without an anti-democratic flavor."[65] The line between judicial functions and legislative functions is a thin one, and activist state courts must avoid stepping into the legislature's shoes.[66] Divergence, therefore, should be limited to occasions when there are principled reasons for extending further constitutional protections, for, as pointed out by one commentator, "[p]ossessed of neither the purse nor the sword, the power and influence of . . . [a] Court are in direct proportion to the respect which its decisions command."[67]

III. Deciding When to Diverge: A Decisional Framework for State Courts

The purpose of this article is not to argue that state courts should not interpret state constitutions as providing broader rights than those provided under the federal Constitution; rather, it is to point out the problems caused by such divergence. The author does not believe that the problems outlined above, either by themselves or taken together, compel the conclusion that state courts should never diverge. Rather, such problems lead to the conclusion that the independent interpretation of state constitutions is not a path without certain costs, and that such costs, when considered carefully, counsel against it becoming a common practice of state courts.

When should a state court diverge from federal constitutional precedent when interpreting similar state constitutional provisions? This section first discusses the role of state constitutions in protecting indi-

63. A court which the public believes has become too active may be reined in by political checks. *See supra* note 24 for examples. In Florida, an initiative was passed providing that the search and seizure clause of the state constitution "shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. 1, § 12 (1968, amended 1982). After the California Supreme Court found that capital punishment violated the state constitution, the California voters enacted by initiative a constitutional amendment declaring that the "death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment . . . nor . . . be deemed to contravene any other provision of this constitution." CAL. CONST. art. 1, § 27 (1879, amended 1972).

64. *See supra* notes 24, 63; *see also* Bator, *supra* note 52, at 623-25; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

65. Howard, *supra* note 2, at 941.

66. Deukmejian & Thompson, *supra* note 38, at 999-1006.

67. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 758 (1972).

vidual liberties. It then discusses several factors which should be considered by state courts in deciding whether to expand individual protections under the state constitution beyond those granted by the federal Constitution.[68]

A. *The Role of State Constitutional Protections in the Federal System*

One premise of this article is that the role of the United States Supreme Court is to protect the fundamental civil liberties guaranteed by the federal Constitution. The role of the state courts in constitutional jurisprudence, therefore, is to determine when to provide greater protection under the state constitution than is available under the federal Constitution.

In determining the respective roles of federal and state constitutional rights, it is necessary to begin with the recognition that, in some instances, state bills of rights preceded the federal Bill of Rights, and that federal constitutional protections did not apply to actions by the states until their incorporation into the fourteenth amendment.[69] Since such incorporation, however, it is apparent that the federal Constitution has emerged as the primary source of fundamental constitutional rights.[70] Although some commentators hark back to the classical model of state primacy, the better view is to treat the role of state constitutional protections as a supplemental one.[71] Such a "supplemental" view re-

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68. The discussion below assumes that the federal constitutional issue in question has been decided by the United States Supreme Court. When the scope of federal protection has not been so decided and instead there is federal precedent only from federal appellate and district courts, or perhaps no federal precedent, the problem of divergence is not as great. First, there is often no settled federal law from which to diverge. Second, in such a case, the state court may decide the case on the federal issue. Third, where there is federal law on point, it is often split. The state court could decide to adopt one rule or the other as its own rule. In short, there is not the problem of disrespect, lack of uniformity (which may also exist in the federal caselaw) or unprincipled divergence.

69. People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 325, 329 (1975):

> It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

Id. at 550, 531 P.2d at 1113, 119 Cal. Rptr. at 329. *See also* Right to Choose v. Byrne, 91 N.J. 287, 293, 450 A.2d 925, 931 (1982); Linde, *supra* note 2, at 174 ("[T]he federal Bill of Rights was drawn from the earlier state declarations of rights adopted at the time of independence . . . [and] most protection of people's rights against their own states entered the federal Constitution only in the Reconstruction amendments of the 1860's . . . ."); *Developments in the Law*, *supra* note 2, at 1326-29. *Cf.* State v. Bolt, 689 P.2d 519, 523 (Ariz. 1984) (stating that "Arizona's constitutional provisions generally were intended to incorporate the federal protections").

70. Right to Choose v. Byrne, 91 N.J. 287, 293, 450 A.2d 925, 931 (1982); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 718 (1983); *see also* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977) (arguing that the political insulation of federal courts renders them better able to protect individual liberties against majoritarian pressures).

71. Advocates of the "primacy" approach argue that the state constitution is an entirely separate source of constitutional protection and that, therefore, the state court is obligated to decide a constitutional issue first under its own constitution before reaching the federal constitutional issue. Linde, *supra* note 2, at 178-79; Welsh, *supra* note 24, at 1125; Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29

flects the realty of federal constitutional protections and the supremacy of such protections.[72] Once it is accepted that state constitutional protections will serve as supplements to federal constitutional protections, the issue becomes one of when these state protections should be extended. Although the state courts possess the power to diverge whenever they desire, problems of uniformity, remedies, and federalism counsel against frequent exercise of this power. This article proposes a conservative approach for such divergence, based on the national or local character of the right in issue, and whether it is a matter of extending protection beyond that provided under the federal Constitution or maintaining a protection in the face of a contraction of the federal protection.

When a state constitutional right does not interfere with federal interests and concerns activities that do not have substantial effects beyond state boundaries, it can be considered a "local" right. In contrast, a right is "national" in character when it is either intertwined with federal laws and policies which would be disrupted by separate state rules, or when it will have substantial effects beyond state boundaries. Divergent interpretation by state courts of local rights may involve fewer costs than those which result when the right is national. State courts are often better equipped to determine the need for additional constitutional protections in local situations. Moreover, because the exercise of such rights would have minimal impacts outside the state, there is less of a need for uniformity. Where a national right is involved, state court divergence is more difficult to justify. Uniformity is important in these national areas, and direct conflicts between state and federal laws should be avoided. Moreover, the United States Supreme Court is better able to balance national concerns when determining the scope of these rights because a state court's views are more provincial.

An example of a national right is provided by the cases of *People v.*

STAN. L. REV. 297, 317 (1977); *see also* Massachusetts v. Upton, 104 S. Ct. 2085, 2089-91 (1984) (Stevens, J., concurring); State v. Hunt, 91 N.J. 338, 346-48, 450 A.2d 952, 960-62 (Pashman, J., concurring). One problem with the primacy approach is that no matter how true such a model is to constitutional history, see Welsh, *supra* note 24, at 1132-41, it is of questionable value in describing the role of state constitutions in the current federal system. As noted by Justice Pollock of the New Jersey Supreme Court, the primacy model "downplays the realty of the dominant role of the federal Constitution." Pollock, *supra* note 70, at 718; *see also Developments in the Law*, *supra* note 2, at 1356-59 (proposing an "interstitial approach"). This "dominant role" results from the incorporation of the Bill of Rights into the fourteenth amendment, and from the supremacy clause which prohibits state laws from conflicting with the federal Constitution. The net result is that state constitutional protections are relegated to a "supplemental" role. State constitutional protections are only meaningful if they go *beyond* federal protections, for if they fall below the federal protections, they are of minimal practical significance as they will be preempted by federal protections by operation of the supremacy clause. *But see* Massachusetts v. Upton, 104 S. Ct. 2085 (1984) (Stevens, J., concurring). Justice Stevens sees the relative roles of federal and state constitutions in a different light; to him, state constitutions are the "primary guardian" of individual liberty, while the federal Constitution is the "ultimate guardian of individual rights." *Id.* at 2091.

72. Federal constitutional protections are more complete because state protections do not constrain the federal government. *See supra* note 23 and accompanying text.

Sporleder[73] and *People v. Timmons*,[74] in which the Colorado Supreme Court decided not to follow *Smith v. Marylands* [75] and held that pen registers[76] infringed upon individual expectations of privacy protected by the Colorado Constitution. The Colorado Supreme Court based its holdings on the state constitution because it found the United State Supreme Court's holding in *Smith* to be "unconvincing."[77] In neither opinion did the Colorado Supreme Court address the extent to which federal law was involved. As noted by Justice Erickson in his dissent in *Timmons*, "the area of electronic eavesdropping and wiretapping has been the subject of pervasive federal legislation."[78] Moreover, it is an area of national concern because it implicates an individual's privacy interest in telephone calls that go beyond state lines. Thus, Colorado's constitutional protection may conflict with other states which follow the holding in *Smith*.[79] For instance, assume that *X* places a call from Denver to *Y* in New York to order illegal narcotics. Presumably, a pen register record of the call would not be admissible in a prosecution against *X* in Colorado. But, assuming New York does not extend state protections beyond *Smith*, may New York use the record as evidence if it prosecutes *X* and *Y*? As telephone communication is the most common method of interstate communication, it would be desirable to have uniform rules for the use of pen registers so that both federal and state law enforcement officer will be able to monitor interstate criminal activity. It is in such areas that state courts should be most hesitant to diverge from federal precedent, yet the Colorado Supreme Court did so without considering these issues.

An example of local law is illustrated by the "shopping center" cases which considered the constitutional rights of those who wish to collect signatures for political petitions on private property. In 1979, the California Supreme Court departed from federal constitutional precedent[80] and held that the California Constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[81] The United States Supreme Court

73. 666 P.2d 135 (Colo. 1983) (installation of pen register must be preceded by search warrant because it is a search and seizure under Colorado Constitution).

74. 690 P.2d 213 (Colo. 1984) (applied rule in *Sporleder*).

75. 442 U.S. 735 (1979) (no search warrant required when installing a pen register because there is no legitimate expectation of privacy in phone numbers dialed).

76. "A pen register records the numbers dialed from a particular telephone and counts the numbers of incoming calls. It does not record or monitor conversations." *Timmons*, 690 P.2d at 214, n.1.

77. *Sporleder*, 666 P.2d at 143 n.6. *Cf.* State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (reaching a holding similar to *Sporleder* but basing it on a difference in language between constitutional provisions and preexisting state law).

78. People v. Timmons, 690 P.2d 213, 218 (Colo. 1984) (Erickson, C.J., dissenting) (citing the Omnibus Crime Control and Safe Streets Acts of 1968, 18 U.S.C. § 2510 (1982), which regulates the interception of certain wire and oral communications by both federal and state officials).

79. *See supra* note 75.

80. *E.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976) (employees did not have first amendment right to picket in front of their employer's leased store in a shopping center).

81. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd*, 447 U.S. 74 (1980).

affirmed this decision, holding that the exercise of such a state constitutional right did not infringe on the shopping center owners' federal first amendment rights or their federal protection from a taking of property without just compensation under the fifth and fourteenth amendments.[82] Other states have followed the California Supreme Court's ruling and found constitutionally protected rights to speak and petition on privately owned property.[83] The issue of whether there is a constitutional right to speak, petition, or assemble on private property such as shopping centers does not implicate national concerns. It is largely a local issue because political elections are conducted by the states, and state law governs private ownership of property. Thus, when such local rights are at issue, state court divergence is more appropriate. There will be a negligible effect beyond the state's boundaries if it adopts such a right, and the state courts are better suited to weigh the local interests involved.[84]

A second area in which state constitutional protections can play an important role is when they serve as a "backup" in the event that rights guaranteed by the federal Constitution are dramatically curtailed. The presence of an alternative source of individual protection provides a check on severe contractions of federal constitutional rights.[85] In the case of such a contraction of federal rights, state constitutions could assume a more important role in delineating individual rights and protecting those rights in which individuals have an expectancy.[86] Such a role

82. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980).

83. *E.g.*, Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590 (1983) (state constitution protects the right to solicit nominating signatures in private shopping centers in support of political candidate's efforts to be placed on ballot); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) (state constitution protects freedom of speech and assembly on the grounds of a private university), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

84. *See* State v. Hunt, 91 N.J. 338, 352, 450 A.2d 952, 966 (1982) (Handler, J., concurring) ("When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law.").

An influential article, *Developments in the Law*, *supra* note 2, at 1344-45, proposes that state constitutional law be treated as a "core" area under National League of Cities v. Usery, 426 U.S. 833 (1976), and that therefore, federal intervention in the form of United States Supreme Court review of state judgments should be limited. The Court, however, recently overruled *National League of Cities*, in Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, *reh'g denied*, 105 S. Ct. 2041 (1985) where the Court held that Congress could regulate the states under the commerce clause. Nonetheless, the United States Supreme Court has recognized that in certain areas of law, federal intervention should be avoided and that the expertise of local courts should be applied. *See* Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 349-50 (1951).

One commentator has suggested that constitutional issues concerning local taxation and education policies are better suited to state courts. Pollock, *supra* note 70, at 714-17.

85. It should be noted that state constitutions would not be a complete "backup." Presumably, the federal government is not subject to state constitutional protections due to the supremacy clause. *See supra* notes 18 and 23.

86. *See* People v. Bustamante, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981):

> A blind following of Supreme Court precedent would frustrate our ability to protect rights enjoyed by Californians and to maintain consistency in California law. If the United States Supreme Court hands down a decision which limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion, it may become incumbent upon this court to employ the California Constitution to maintain consistent principles protecting those rights.

should come into play, however, only when dealing with exceptional legislative or executive actions, such as amendment of the Bill of Rights or congressional limits on, or elimination of, the lower federal courts or federal remedies.[87] It is in such exceptional cases that the state courts may need to become the primary protectors of both state and federal constitutional rights.[88]

Thus, as a first step in determining when to diverge from federal constitutional precedent, a state court should decide whether the right asserted is local or national in character, or whether it is a right which has been substantially contracted under federal law and therefore may be in need of additional state protection. Once a state court determines that the institutional role of state constitutional protections may justify more extensive protection of the individual right, several other factors should be considered before deciding to diverge.

B. *Other Factors Involved in the Decision to Diverge From Federal Constitutional Precedent*

In addition to considering the character of the right asserted and whether there is a need for state protection due to a contraction of a parallel federal right, there are other factors a state court should consider before diverging from federal constitutional precedent.

Id. at 94, 634 P.2d at 932-33, 177 Cal. Rptr. at 582.

While the *Bustamante* opinion is not a model of the judicial restraint advocated by this article, it does illustrate the expectations of the citizenry in certain constitutional rights. In the event the Bill of Rights were amended so that it did not protect the right of citizens to assemble in public forums to express their opinions, the state courts might decide that such a right exists under their state constitutions, thus protecting the expectations of those who have become accustomed to this constitutional right.

87. In most cases exceptional circumstances would be limited to legislative or executive action. In some situations, however, contraction of federal constitutional rights by the United States Supreme Court could also initiate greater state protections. To this author, the "exceptional circumstances" justification should be used rarely and should not be used as an excuse to avoid federal precedent with which state court judges disagree for political reasons. The touchstone should be citizen expectancy, *see supra* note 86. As an example, should the United States Supreme Court ever hold that the *Miranda* warnings are no longer required by federal law, see Oregon v. Elstad, 105 S. Ct. 1285, 1291 (1985), and New York v. Quarles, 104 S. Ct. 2626, 2630-31 (1984) (both cases describe *Miranda* as a "prophylactic rule" that is not constitutionally required), state courts might decide that, due to the widespread belief that citizens have a right to *Miranda* warnings, constitutional *Miranda*-type warnings would still be required under the state constitution.

A distinguishable situation is presented where federal law is uncertain and the United States Supreme Court has oscillated, such as in the scope of automobile searches incident to arrest. *See* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 394 (1980). In this situation, state courts may decide to base a decision on state law due to the uncertainty of federal law. *See* Pollock, *supra* note 70, at 712. This uncertainty should be a factor for state courts to consider in deciding whether to diverge, but it should not be dispositive.

88. *See, e.g.*, Bator, *supra* note 52, at 627 (where, in discussing the state court's roles in interpreting federal constitutional protections, Bator notes that "[it] is the state, and not the lower federal courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights").

1. Uniformity, Remedies, and Federalism

In deciding whether to diverge, the effects of such divergence should be considered. Uniformity interests will, of course, be considered in analyzing the local or national character of the right asserted. But such an interest in uniformity should also be considered in the abstract: is this a right involving an interest in uniformity, or is this a right in which experimentation in the different states would be beneficial? Remedies should be considered. If the right could not be adequately protected by injunction, state courts should hesitate to diverge from federal law because any state damage remedies would need to be implied by the state court. As with uniformity, federalism concerns will also be considered in the local/national analysis. But the state court should analyze any further impacts on the workings of the "federal" judicial system, such as whether the right would commonly be asserted in federal court under diversity or pendent jurisdiction.

2. Similarity of Language Between State and Federal Provisions and Legislative History

When the state and federal constitutional provisions are substantially identical, a state court should be more hesitant to diverge from federal constitutional precedent absent special circumstances.[89] Where special circumstances are present, such as where the legislative history of the state constitutional provision indicates that the state intended to offer broader protections than those available under the federal Constitution, state courts should give content to such legislative intent.[90]

Substantial differences in language between the state and federal provisions also support a finding of more extensive rights under the

89. "Substantially identical" means that the differences in wording are not material. For example, the 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 . . ." U.S. CONST. amend. IV, while the Colorado Constitution provides: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without . . . probable cause. . . ." COLO. CONST. art. II, § 7.

There are many instances, however, where material differences in language exist. For example, while the first amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble and to petition the Government . . ." U.S. CONST. amend. I, the New Jersey Constitution provides "Every person may freely speak, write and publish his sentiments on all subjects . . ." N.J. CONST. art. I, para. 6, and the Massachusetts Constitution provides "The right of free speech shall not be abridged." MASS. CONST. art. XVI (1780, amended 1948). *Compare* U.S. CONST. amend. VIII (forbidding "cruel and unusual punishments") *with* CAL. CONST. art. I, § 17 (1879, amended 1974) (forbidding "cruel or unusual punishment"). In People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972), the California Supreme Court used this difference in language to find that capital punishment violated the state constitution.

90. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (where California court analyzed legislative history and difference in language between state and federal constitutional provisions), *cert. denied*, 406 U.S. 958 (1972). It should be noted, however, that there is a paucity of legislative history regarding legislative intent when differently worded state provisions are enacted.

state constitution.[91] For example, in *Robins v. Pruneyard Shopping Center*,[92] the California Supreme Court found that the difference in language between federal and state constitutions was dispositive. The court held that the language of the state constitution's guarantee of freedom of expression[93] was broader than the first amendment and therefore granted broader rights than its federal counterpart.

3. Special State Factors: Pre-existing Law or Tradition

In some instances, there may be other state law factors which suggest expanding state constitutional protections beyond those provided by federal law. Several courts have considered the development of state law in related areas. For example, in *Right to Choose v. Byrne*,[94] the New Jersey Supreme Court based its divergence from federal law, in part, on the greater rights a woman had under state common law. Other courts have considered less tangible state traditions. The Alaska Supreme Court protected adults possessing marijuana under the state constitution's guarantee of privacy stating that Alaska "has traditionally been the home of people who prize their individuality and who have chosen to . . . [live] here in order to achieve a measure of control over their lifestyles which is now virtually unattainable in many of our sister states."[95] Pre-existing law and tradition alone, while relevant to the state court's decision, would seldom rise to the level of importance which would justify divergence from federal law. If, however, other factors are present, traditions or pre-existing law may support a decision to diverge.

C. *Summary*

A state court's decision to expand state constitutional protections beyond those provided by the federal Constitution should begin with an analysis of whether there is a role for additional state protection. Such state protection is most clearly justified when the right asserted is local in nature or when a similar federal right has been contracted. If such a right is at issue, a state court should then consider other factors such as the similarity in language between state and federal provisions, any special state law or traditions, whether special remedies will be required, and the impact that extending the protection will have on uniformity and federalism.

Where the state court has decided to diverge from federal prece-

91. *See, e.g.*, Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590 (1983) (broader right of freedom of expression based on difference in language between state and federal constitutions); Right to Choose v. Byrne, 91 N.J. 287, 295, 450 A.2d 925, 933 (1982) (New Jersey Supreme Court diverged from federal constitutional precedent basing its decision on "more expansive" state constitutional language and pre-existing state law governing a woman's right "to choose whether to carry a pregnancy to full-term").

92. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

93. "Every person may freely speak, write, and publish his or her sentiments on a subject . . . ." CAL. CONST. art. 1, § 2 (1879, amended 1974).

94. 91 N.J. 287, 295, 450 A.2d 925, 933 (1982).

95. Ravin v. State, 537 P.2d 494, 504 (Alaska 1975).

dent, it should clearly set forth its reasons for doing so.[96] The proper approach would be to address the federal issue first and state that federal law would not protect the right in issue.[97] Then the state court should set out its reasons for differing from federal law and make a "plain statement" that its holding is based on state law.[98] Such an approach would make it evident that the right was based on state law and also make clear what the federally guaranteed minimum protection would be, thus allowing for valid amendment of the state constitution if the new rule was unpopular.[99]

When a state court decides not to diverge from federal constitutional precedent, the issue arises whether it should rest the decision on federal law without mentioning state law, or whether it should explicitly adopt the federal rule as state law. Two considerations are important. First, if the state court rests its decision on federal grounds, unnecessary state constitutional adjudication can be avoided.[100] Moreover, if the de-

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96. State courts have taken several approaches in deciding when to base a decision on state grounds when a litigant has raised both federal and state constitutional grounds. *See* Linde, *supra* note 2, at 178. One approach is to decide both state and federal grounds in different parts of the opinion. *See* State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982). A different approach, advocated by Justice Pollock of the New Jersey Supreme Court, is to reach state law only after deciding that the right is not protected by federal law. *See* Pollock, *supra* note 70, at 718-20; Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982). A third approach, advocated by Judge Hans Linde of the Oregon Supreme Court, is to decide first whether the right is protected under the state constitution. The federal issue should be decided only if the state constitution does not prohibit the infringement of the right asserted. *See* Linde, *supra* note 2, at 178-79; Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) (stating that "the proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim").

97. *See supra* note 71. Courts applying the "primacy" approach would not discuss whether the right was protected by federal law unless they decide that the right was not protected by state law. *See, e.g.*, Linde, *supra* note 2, at 178-79. Under the "supplemental" approach advocated by this article, federal protections should be considered first before a decision is made to extend state protections beyond those provided under the federal Constitution.

98. By making a "plain statement" that the decision is based on state law, the state court will be complying with the rule announced in Michigan v. Long, 463 U.S. 1032 (1983), discussed *supra* at note 21.

99. A common criticism of state court divergence based on an "interstitial" or "supplemental" model is that it creates the possibility of "dual reliance" or "unreviewable" judgments. *See, e.g.*, Deukmejian & Thompson, *supra* note 38, at 996-99; Welsh, *supra* note 24, at 1126-28. When a state court adopts broader rights explicitly under the state constitution, review by the United States Supreme Court is barred by the doctrine of adequate and independent state grounds. *See supra* notes 18-21 and accompanying text. If, at the same time, the state court alternatively bases its decision on federal law, the state ground will be more difficult to change by amendment. The uncertainty of the state court's accuracy in its determination of the federal ground makes amendment by the legislature or the initiative process more difficult. Deukmejian & Thompson, *supra* note 38, at 987, 999; Welsh, *supra* note 24, at 1127. If, however, the state court only extends protections under the state constitution when the federal Constitution does not guarantee such a right, the problem of alternative grounds will be avoided. In many cases, state courts will defer to federal law, and their decisions will be reviewable by the United States Supreme Court. If a court decides to diverge, such divergence will be expressly based on the state constitution, so that "political" review will be available.

100. *See, e.g.*, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (United States Supreme Court avoids ruling on constitutional issues when the case may be decided on other grounds); *see also In re* Roger S., 19 Cal. 3d 921, 944, 569 P.2d 1286, 1300, 141 Cal. Rptr. 298, 312 (1977) (Clark, J., dissenting) (Cali-

cision is based alternatively on both federal and state grounds, it may create an "unreviewable decision." The decision will not be reviewable by the United States Supreme Court because it rests on adequate and independent state grounds, and it cannot be changed by state constitutional amendment because it rests on federal constitutional grounds.[101] Thus, where both state and federal issues have been presented and the state court has decided not to diverge from federal precedent, the better course is to rest the decision on federal grounds, explicitly stating that the state court has decided not to extend further protection under the state constitution. Such a decision would be subject to United States Supreme Court review, but it would also inform citizens that their state constitutional rights were coextensive with their federal rights. It would foreclose future reliance based on a belief that state rights might be broader in a particular area of law and would inform citizens that if they desire broader rights, such rights would need to be effectuated by constitutional amendment.

CONCLUSION

This article has urged that, for a number of reasons, state courts should be hesitant to diverge from the constitutional protections provided by the federal Constitution. The discussion has centered on the issue of when state courts should provide additional protections to their citizens and has urged that a conservative approach be adopted by state courts.

State constitutional protections are best viewed as supplemental sources of protection for individual rights. Reliance on state constitutional provisions generally should be limited to cases in which the right asserted is local in character or where it is necessary to protect a right in the face of a substantial contraction of federal constitutional rights. In such situations, state courts should also examine the costs of divergence and the effects that such divergence will have on the federal system.

United States Supreme Court Justice Stone once commented that "the only check upon our own exercise of power is our own sense of self restraint."[102] This statement aptly applies to state courts as well, for

fornia Supreme Court avoids ruling on constitutional issues when the case may be decided on other grounds). *But see* Massachusetts v. Upton, 104 S. Ct. 2085, 2090-91 (1984) (Stevens J., concurring) (stating that by deciding state constitutional questions first, the state court will avoid deciding an unnecessary federal constitutional question).

101. *See* discussion *supra* note 99. In a case where the state court has decided not to diverge, the judgment should rest only on federal or state grounds to avoid the problem of an "unreviewable judgment." For several reasons, this article takes the position that the state court should base its judgment on federal grounds when it decides not to diverge from the federal rule. First, the role of state constitutional protections is supplemental. *See supra* note 71 and accompanying text. Thus, where the state court decides not to extend rights beyond those provided by federal law, the supplemental role of state constitutions is not triggered. Second, state courts have no obligation to decide state questions before reaching federal law. If they may avoid reaching an issue of state constitutional law by resting their decision on federal law, they are following the prudential rule against unnecessary constitutional adjudication. *See supra* note 100.

102. United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

their power to independently interpret state constitutional provisions is subject to few constraints. Yet, while the power of state courts to interpret their state constitutions as they wish is clear, it is also clear that divergence from federal constitutional protections is not without cost. The independent interpretation of state constitutions is protected in the federal system, but this protection should not be abused. State courts must act with a "sense of self restraint."