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State Constitutions Realigning Federalism: A Special Look at Florida

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NOTES

STATE CONSTITUTIONS REALIGNING FEDERALISM: A SPECIAL LOOK AT FLORIDA*

Our states are not mere provinces of an all powerful central government. They are political units with hard-core constitutional status and with plenary governmental responsibility

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> for much that goes on within their borders. Yet at the same time, states are units of the nation and in our federal structure held to the commands of the national constitution and the national laws.
>
> Justice William J. Brennan
> United States Supreme Court[1]

I. INTRODUCTION

Should state courts use their own constitutions[2] to resolve issues, or defer to the interpretations[3] of the United States Supreme Court? The debate remains quite spirited.[4] That states may interpret their

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1. Brennan, *Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 227 (1966). Justice Brennan addressed the dichotomy of the American federalistic system and the necessarily different perspective of the state court judge who may tend to view the United States Supreme Court as usurping state powers. *Id.*; *see also* Cover, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 224 (1983) (the "overarching presence of federal law" restrains facile operation of state law).

2. *See* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 356 (1984) (special problems may arise when Supreme Court upholds a state action under a federal constitution provision creating a shadow that serves as "presumption of correctness"); *see also* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605 n.1 (1981) (expresses concern regarding state courts' practice of avoiding Supreme Court decisions with which they disagree); Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 756 (1972) ("difficult question of propriety" if state court wishes to avoid Supreme Court review merely for fear of narrow interpretations of rights); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 732, 787 (1982) (justification suspect when state courts hold in contradistinction to Supreme Court merely because of ideological differences).

3. *See, e.g.*, People v. Norman, 112 Cal. Rptr. 43 (Ct. App. 1974), *vacated*, 14 Cal. 3d 939, 538 P.2d 237, 123 Cal. Rptr. 109 (1975) (superseded by statute as stated in People v. Daan, 161 Cal. App. 3d, 207 Cal. Rptr. 228 (Ct. App. 1984)); People v. Level, 117 Cal. App. 3d 462, 172 Cal. Rptr. 904 (Ct. App. 1981) (opinion withdrawn by order of court June 25, 1981); State v. Jackson, 672 P.2d 255 (Mont. 1983).

4. The debate is most controversial in criminal procedure, where Warren Court liberality has been the subject of careful reassessment. For comprehensive treatment of the criminal procedure developments, see C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 866-77 (2d ed. 1986) (overview of state court departures from restrictive Supreme Court holdings). *See also* Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982) (detailed analysis of search incident doctrine and three models of state court activism); Schaffer, Harmon, & Helbrush, *Robinson At Large in the Fifty States: A Continuation of the State Bill of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE U.L. REV. 1 (1974) (historical analysis, case law, and procedure for application of state law examined in fourth amendment area); Welsh, *Whose Federalism? — The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983) (Burger Court's type of federalism treated in light of civil liberties); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974) (a seminal article in the field of state independent constitutional adjudication on criminal procedure issues).

own constitutions to expand individual rights[5] guaranteed by the federal government is beyond contention. Recent state court independence,[6] however, has heightened the controversy over the proper interrelationship between the state and federal constitutions. States that were formerly conciliatory are now more assertive,[7] and a few jurisdictions seem almost recalcitrant.[8] Stern warnings from the Supreme

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5. For Supreme Court support of state court expansion of individual liberties, see PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Haas, 420 U.S. 714, 719 n.4 (1975); Ross v. Moffitt, 417 U.S. 600, 618-19 (1974); Lego v. Twomey, 404 U.S. 477, 489 (1972); California v. Green, 399 U.S. 149, 171-72 (1970) (Burger, C.J., concurring). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (without protective force of state law, liberties not fully realized); Utter, *Freedom and Diversity in a Federal System: Perspective on State Constitutions and Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493 (1984) (state constitutions may be more protective of individual rights than United States Constitution).

6. *See* People v. Disbrow, 16 Cal. 3d 101, 133, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) ("We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."); *see also* Hancock, *supra* note 4, at 1110-11 n.93 (extensive listing of independent decisions by the particularly active states of California, Alaska, and Hawaii, as well as independent rulings by Louisiana, Michigan, New Jersey, New York, and Pennsylvania).

7. *See* Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 MO. L. REV. 1, 11-12 (1984). Professor Swindler notes:

> The Missouri Supreme Court, for example, . . . undertook to reassert a long-held theory of political science that a state constitution is not a grant of power but only a limitation of a power which is "practically absolute." Although this appears to be a restatement of old state sovereignty doctrine, in the context of the changed national character of American constitutionalism it becomes an assertion of a revitalized state constitutionalism.

Id. (citing Americans United v. Rogers, 538 S.W.2d 711 (Mo.) (en banc), *cert. denied*, 429 U.S. 1029 (1976)).

Professor Swindler also mentions that Virginia, a conservative state, has likewise considered the Supreme Court's decisions to set the minimum standards whose protections may be widened under state constitutional law. *See id.* at 15.

8. Alaska has frequently based its holdings on the Alaska Constitution. *See supra* note 6. A strong statement of independence was made in Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970):

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights under our Alaska Constitution . . . . We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land.

A similarly independent statement is made in State v. Kaluna, 55 Hawaii 361, 369, 520 P.2d 51, 58 (1974). The court stated:

> [A]s the ultimate judicial tribunal in this state this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of

Court express disapproval of independent adjudication[9] and bring historical notions of federalism into question.

Although criminal procedure has been an especially fertile ground for independent state court adjudication,[10] this dispute affects many other fields of law: first amendment free speech,[11] equal protection,[12] economic regulation,[13] the right to bear arms,[14] religion,[15] the environment,[16] the right to privacy,[17] and education.[18]

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textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purpose of those protections have so warranted.

Id.; *see also* People v. Brisendien, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1110, 119 Cal. Rptr. 315, 326 (1975) (holding based on California Constitution, which required "a more exacting standard for cases arising within this state").

9. *See, e.g.*, Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring) (suggests state residents amend state law to comply with "rational law enforcement").

10. *See supra* note 4.

11. *See, e.g.*, Wilson v. Superior Ct., 13 Cal. 3d 652, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 474-75 (1975) (state protections of free speech exceeded those of federal Constitution); Holden v. Pioneer Broadcasting Co., 228 Or. 405, 365 P.2d 845 (decision based on Oregon Constitution in defamation action), *cert. denied*, 370 U.S. 157 (1961); State v. Beno, 116 Wis. 2d 122, 341 N.W.2d 668, 674 (1984) (Wisconsin courts not restricted to Supreme Court interpretation of federal speech clause).

12. *See* Dupree v. Alma School Dist., 279 Ark. 340, 651 S.W.2d 90, 92-93 (1983) (state provision for equal protection applies to funding for schools); People v. Marcy, 628 P.2d 69, 74 (Colo. 1981) (en banc) (state provision for equal protection demands crime classification relate to state interests).

13. Economic regulation has received a singularly laissez-faire treatment by the Supreme Court. *See* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) ("Whether the legislature takes for its textbook Adam Smith, Herbert Spenser, Lord Keynes, or some other is no concern of ours."). Such indifference has spawned more careful analysis by the state courts. *See* Bulova Watch Co. v. Brand Distrib., 285 N.C. 467, 477-78, 206 S.E.2d 141, 148-49 (1974) (North Carolina Constitution prohibited fair trade laws under theory of economic due process).

14. *See, e.g.*, State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981) (right to bear arms rests on state constitutional provision).

15. *See, e.g.*, Opinion of the Justices, 59 Del. 196, 200-01, 216 A.2d 668, 671, (1966) (Delaware Constitution could not sanction bus transportation for students attending private schools).

16. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 912-16 (1976) (listing of state constitutional provisions protecting the environment).

17. *See* State v. Elliot, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975) (state sodomy law violated right to privacy).

18. *See, e.g.*, Serrano v. Priest (Serrano II), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (holding that money spent on public schools could not be a function of district's tax base in contradistinction to Supreme Court's decision in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973)), *cert. denied*, 432 U.S. 907 (1977); Robinson v. Cahill, 62 N.J. 473, 515, 303 A.2d 273, 295 (New Jersey Constitution required equal educational opportunities for all children), *cert. denied*, 414 U.S. 976 (1973).

This note first analyzes the history and evolution of federalism, then examines the doctrine of adequate and independent state grounds, along with recent developments resulting from the Supreme Court's decision in *Michigan v. Long*.[19] Next, theoretical arguments commonly advanced against aggressive use of state constitutions are explored. Special attention is devoted to Florida's antifederalistic[20] constitutional amendment,[21] which requires Florida courts to construe fourth amendment rights in conformity with United States Supreme Court decisions. A recommended approach is suggested for state courts and Florida practitioners.

II. FEDERALISM AND STATE CONSTITUTIONS

The states were historically the first to guarantee individual rights.[22] Before the federal Constitution was enacted, all but one of the thirteen original states had adopted constitutions[23] that provided such protections as freedom of the press, the right to a speedy jury trial, assistance of counsel, the right to confront witnesses, and freedom from self-incrimination.[24] The federal Bill of Rights was largely

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19. 463 U.S. 1032 (1982).

20. The author uses the word "antifederalistic" because the amendment restricts federalism to that advanced by the federal government only. BLACK'S LAW DICTIONARY 551 (5th ed. 1979) defines federalism as "Term which includes interrelationships among the states and relationship between the states and the federal government." It is precisely this interrelationship that is breached when the association is operative only on one side.

See also Dauer & Havard, *The Florida Constitution of 1885 — A Critique*, 8 U. FLA. L. REV. 1, 4-5 (1955). According to Dauer and Havard, federalism requires a division of powers:

> The principle of federalism complicates our national constitutional structure, inasmuch as it implies a division of legal sovereignty between the central government and its constituent members, the states. This factor is extremely important to the constitutional picture in this country, because provision must be made not only for deciding what powers are to be assigned and what limitations are to be placed on government but also how a division of these legitimate basic powers is to be made between the national and state governments.

Id. See infra note 26 and accompanying text.

21. FLA. CONST. art. I, § 12 (1968, amended 1982) (search and seizure in Florida must be construed in conformity with fourth amendment to United States Constitution).

22. Dauer & Havard, *supra* note 20, at 6 ("After all, the first state constitutions were drafted prior to the Federal Constitution, and much of the latter's content was derived from the former.").

23. R. POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 111 (1957) (the one state that had not yet adopted a constitution was Rhode Island); *see* Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 955 (1982).

24. Linde, *First Things First: Rediscovering States' Bills of Rights*, 3 U. BALT. L. REV. 379, 381 (1980); *see* Dauer & Havard, *supra* note 20, at 27. The Florida Constitution's Declaration of Rights was written in 1885 and follows the Federal Constitution with a few additions. *Id.*

based on state constitutions,[25] and intended to supplement rather than substitute for protections provided by the states.[26] The United States thus has a dual system of protection that requires participation from both the states and the national government for effective protection of liberties.[27]

The tenth amendment supports the historical evidence that states were intended to be sovereign entities in protecting individual liberties. The amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[28] Although

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See also R. POUND, *supra* note 23, at 82-111 (1957). State bills of rights written after the federal Bill of Rights have generally followed the federal model. Those written first, however, often contained a disparate panoply of protections. *Id.* at 83. For example, New Hampshire and Pennsylvania prohibited taking of property for public use without compensation. *Id.* Pennsylvania also provided for the right to migrate, which later appeared in the privileges and immunities clause. *Id.* at 84. North Carolina and Maryland prohibited monopolies well in advance of the Sherman Antitrust Act of 1890. *Id.* Provision for security of life, liberty, and property found expression in many state constitutions, such as that of Georgia, which also had a habeas corpus provision. *Id.* at 86. With respect to the rights of criminal defendants, several states required one or more of the following: accused must be supported by witnesses on his behalf; general warrants may not be issued; self-incrimination may not be required; cruel and unusual punishment is banned; and no excessive bail should be exacted. *Id.* at 86-89. Pound notes that these rights, first derived from the common experiences of the English, were transferred to the thirteen original states and then to the national government. *Id.* at 111. Since the federal Court is now in a period of retrenchment, *see, e.g.*, Wilkes, *supra* note 4, at 421, the independent power of the state to adjudicate on the basis of its constitution assumes renewed importance.

25. Dauer & Havard, *supra* note 20, at 6.

26. *See, e.g.*, Utter, *supra* note 5, at 497:

> It is by now commonplace to note that the state constitutions were originally intended as the primary devices to protect individual rights, and the United States Bill of Rights was intended as a secondary layer of protection against the power of a weak central government with very limited powers. Perhaps that is why state courts have often been the first to develop techniques for protecting individual rights and the United States Supreme Court later adopted and read into the United States Constitution.

27. *See, e.g.*, Brennan, *supra* note 5, at 503.

28. U.S. CONST. amend. X. As a point of comparison, the West German Constitution, the Basic Law, provides for individual units of Germany, called Länder, which may legislate in areas not preempted by the federal government: "The Länder shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation." GRUNDGESETZ [GG] art. 70, § 1 (W. Ger.).

The individual Länder, like the American states, have their own constitutions, resulting in a dual system of federalism. *See, e.g.*, Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 1104 (1960) (rights in addition to those in their Basic Law are protected by separate state constitutions). The Basic Law, however, like the United States Constitution, provides for a sort of supremacy clause: "Federal law shall override Land law." GRUNDGESETZ [GG] art. 31 (W. Ger.). The result of this provision, when

the amendment has had a checkered history,[29] it is not dead.[30] The

coupled with article 70, which allows state legislation only in the absence of federal law overriding it, leaves little room for Land independence. *See* Kauper, *supra*, at 1142. One interesting characteristic of German constitutional law provides for federal law to be drawn or framed in the rough, with the details filled in by the individual Land. This is set out as follows in the German Constitution:

> Subject to the conditions laid down in Article 72, the Federation shall have the right to enact skeleton provisions concerning:
> 1. the legal status of persons in the public service of the Länder, communes, or other corporate bodies under public law, in so far as Article 74a does not provide otherwise;
> 1a. the general principles governing higher education;
> 2. the general legal status of the press and the film industry;
> 3. hunting, nature conservation and landscape management;
> 4. land distribution, regional planning, and water regime;
> 5. matters relating to the registration of changes of residence or domicile and to identity cards.

GRUNDGESETZ [GG] art. 75 (W. Ger.). This article thus empowers the German government to set up legal frameworks, which the individual Land will fill in. Article 75 mentions only five areas for treatment as skeleton provisions. In contradistinction to the American system, the various Länder have responsibility for actually enforcing the laws made by the national government. *See* Kauper, *supra*, at 1151. Since states are burdened with enforcement of federal laws, approximately two-thirds of the tax money raised is apportioned to the Länder. *Id.* at 1147. In the final analysis, the German system of federalism is one in which the national government is substantially more powerful than the Länder. By comparison, the American states have much greater independence. *Id.* at 1157.

29. The rise and fall of the tenth amendment is evident in recent times in National League of Cities v. Usery, 426 U.S. 833 (1976) (held a federal law unconstitutional on federalistic grounds for first time in 40 years). The case has, however, after a "truncated existence," been overruled by Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985) (drawing boundaries between traditional governmental functions unworkable and inconsistent with federalism).

The phrase "truncated existence" comes from Professor Moffat's comparison of the life of a legal rule to the rise and fall of a scientific principle. *See* Moffat, *Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction*, 37 U. FLA. L. REV. 297, 324-37 (1985). The model looks at the rules of judicial decisions as paradigms. *Id.* at 324. Thomas Kuhn described the life of a scientific theory by reference to paradigms that retain validity as long as they satisfactorily explain the phenomenon. *Id.* But as problems develop whose solutions may not be found within the confines of the paradigm, questions arise concerning the theory's utility. Alternative explanations are advanced that will better solve the problems, until at one point a new paradigm replaces the old one. *Id.* at 325.

Professor Moffat provides Furman v. Georgia, 408 U.S. 238 (1972) as an example of a truncated paradigm. *See* Moffat, *supra*, at 332-33. In *Furman*, the Supreme Court disallowed the death penalty if imposing it were left to the untrammeled discretion of the jury. The capital punishment opponents, however, had a temporary victory, which fell with the decision in Gregg v. Georgia, 428 U.S. 153 (1976). *See* Moffat, *supra*, at 333. Gregg sustained the constitutionality of new state statutes drafted to meet the requirements in *Furman*, and undercut the new paradigm *Furman* had established only four years earlier. *Id.* at 334. The *Furman* decision was thus "truncated" and replaced by another paradigm whose rationale was more in keeping with the values of society. *Id.* at 335.

30. *See, e.g.*, Fry v. United States, 421 U.S. 542, 547 (1975). Justice Marshall stated:

> While the Tenth Amendment has been characterized as a "truism," stating merely

powers of the national government were narrowly defined to allow states the freedom to regulate the affairs of their own citizens without undue federal influence.[31]

Nor were the state bills of rights intended to mirror only those rights provided in the federal Constitution.[32] State constitutions must reflect the views of each state's citizenry rather than simply duplicating federal provisions, and inspire confidence in the laws and institutions created by the instrument.[33] Unless the people believe the laws truly represent their interests, the states' functioning will be impaired.[34]

> that "all is retained which has not been surrendered," *United States v. Darby*, it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

Id. (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

31. Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, 42 OHIO ST. L.J. 209, 215 (1981) ("state power was left almost unlimited, with very few substantive constraints").

32. Many of the state constitutions preceded the federal drafting. These clearly cannot be seen as mere reflections of the federal protections. *See supra* notes 22-24. But even the state constitutions that were written after the federal drafting were not dependent upon national guarantees. *See, e.g., Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982) [hereinafter *Developments in the Law*] ("The duty to protect individual rights, a duty that both our federal structure and their own constitutions impose on the states, requires that state courts not regard their constitutions as mere mirrors of federal protections.").

33. *See* Dauer & Havard, *supra* note 20, at 3; *see also* L. FULLER, THE MORALITY OF LAW 19-27 (rev. ed. 1969). Fuller equates the morality of duty with the economics of exchange, which rest upon "reciprocity." *Id.* at 19. There are "three conditions for optimum realization of the notion of duty, the conditions that make a duty most understandable and palatable to the man who owes it." *Id.* at 23-24. The three conditions may be succinctly described as (1) the relationship from which the duty arises must be voluntary, (2) the values exchanged must be equal, and (3) the relationships must be reversible. *Id.* at 23. Subsequent use of the term "reciprocity" in this Note is in the sense of the word as defined by Fuller's exchange theory.

Fuller discusses in this connection the Commodity Exchange Theory of Law of Soviet jurisprudence scholar, Eugene Pashukanis. *Id.* at 24. Pashukanis viewed reciprocity as a market event of bargained exchange, which was a trait of capitalism inconsistent with a Marxist state. *See* L. FULLER, *supra*, at 24. This theory is then applied to morals, with the resulting disappearance of both legal rights and duties. *Id.* at 25. As Powell stated, "[s]ince Pashukanis views the morality of duty as coexistent with and dependent upon the economy of the marketplace, he assumes the two will disappear arm in arm." Powell, *The Legal Nihilism of Pashukanis*, 20 U. FLA. L. REV. 18, 32 (1967). Pashukanis' work is treated in Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 115-25 (J. Hazard ed., H. Babb trans. 1951). *See also* R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 160-61 (rev. ed. 1954) (synopsis of Pashukanis' thought); Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxist Legal Theory*, 47 MICH. L. REV. 1157-66 (1949) (summary of Pashukanis' theory). For the practical applications and utility of jurisprudence for the practicing attorney, see generally *A Symposium on Jurisprudence, Focus: The Lawyer*, 19 U. FLA. L. REV. 395-565 (1967).

34. *See supra* note 30.

The United States Supreme Court defines the irreducible standards of federal constitutional protections.[35] The states are free, however, to expand the limits of individual liberties,[36] even when the Supreme Court has denied a right under federal provisions. For example, in *Washington v. Chrisman*,[37] a student was convicted of possession of drugs after the arresting officer, who had followed the student to his dormitory room, spotted marijuana from the doorway. The Washington court held that the fourth amendment prohibited the officer from entering the room without a search warrant or exigent circumstances.[38] The Supreme Court reversed, interpreting the fourth amendment to allow the officer to monitor the movements of an arrestee.[39] On remand, however, instead of capitulating to the interpretation of the Supreme Court, the state court held that the officer's action was impermissible on the basis of the Washington Constitution.[40] The federal government, then, sets the constitutionally mandated "floor" for individual rights, and the states set the "ceiling."[41]

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35. *See, e.g.*, Williams, *supra* note 2, at 389. States cannot abrogate individual rights granted by the federal Constitution. States have, however, sometimes held that a particular protection is not required under its own state constitution. A notable recent example is the Oregon Supreme Court's rejection of the necessity for *Miranda* warnings. *See* Yunker, *Oregon Court Rejects* Miranda *Approach*, Nat'l L.J., Oct. 20, 1986, at 3. The decision only rejects *Miranda*'s protections on the basis of the Oregon Constitution, and does not rely on federal constitutional protections. State v. Smith, 301 Or. 681, 725 P.2d 894 (1986). The decision is invalid if *Miranda* is required by the federal Constitution. But some judges, such as Chief Justice Rehnquist, do not seem to think *Miranda* is constitutionally required. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (public safety exception to *Miranda*); Michigan v. Tucker, 417 U.S. 433 (1974) (significance of the case unclear, but may mean a trial judge is free to balance the equities in determining whether certain evidence may be admitted notwithstanding a violation of *Miranda*). Under this analysis, as far as federalism is concerned, the Oregon decision would be valid because it abridged no minimum federal right. *See, e.g.*, Utter, *supra* note 5, at 493 ("The United States Supreme Court has consistently held that state courts may interpret state constitutions to be more protective of individual rights than the United States Constitution.").

36. Williams, *supra* note 2, at 354 ("It is now well recognized that state courts may interpret their constitutions to provide different and more extensive rights than those provided by the federal constitution.").

37. 455 U.S. 1 (1982).

38. State v. Chrisman, 94 Wash. 2d 711, 716, 619 P.2d 971, 973 (1980), *rev'd*, 455 U.S. 1 (1982).

39. *Chrisman*, 455 U.S. at 7.

40. 100 Wash. 2d at 817-18, 676 P.2d at 422; *see also* Roberts, *The Adequate and Independent State Ground: Some Practical Considerations*, 19 LAND & WATER L. REV. 65-52 (1984) (important point that even a Supreme Court reversal without a remand may be treated as a remand and the former state holding reaffirmed on basis of state law).

41. *See* Swindler, *supra* note 7.

The historical system of dual federalism, in which the federal government was supreme in areas delegated to it by the Constitution, and states were able to operate without interference in the remaining fields, has deteriorated only in the past few decades.[42] Commentators characterize this change as a move from a cooperative system to a federally dominated one.[43] The fact that state courts feel compelled to justify their divergence from the Supreme Court evidences dual federalism's decline from the early period of this century.[44]

The states' role in federalism declined partly from selective incorporation of the Bill of Rights into the fourteenth amendment, which applied federal protections to the states.[45] Incorporation of the Bill of Rights was very beneficial to individuals, who had more frequent contact with state rather than national government. The effect of this extension, however, was to reduce the importance of state constitutions by making the federal Constitution the standard for individual liberties.[46]

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42. *See* Walker, *American Federalism — Then and Now*, 24 THE BOOK OF THE STATES 23, 23 (1982) (notwithstanding federal expansion of authority from 1865-1930, Madison's dual federalism was still intact until around 1940).

43. *Id.* at 23-24.

44. *See* Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 176 (1984) ("When they depart from federal decisions, state courts often begin by explaining that the Supreme Court permits them to interpret their state's law in their own way — a sign of how far we have lost sight of basic federalism.").

45. In Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), an opinion by John Marshall, the Bill of Rights was held not to be directly binding upon the states. *Id.* at 243.

46. *See, e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 103-04 (2d ed. 1978). Bickel states:

> The Warren Court was quick to impose the same norms on state and national governments alike. In dealing with the obscenity problem, for example, the Court would not heed Mr. Justice Harlan's plea that separate rules might be made applicable to the federal government and to state and local governments . . . . Again in its decisions on criminal procedure — decisions concerning, for example, unreasonable searches and seizures — the Warren Court sought to enforce national uniformity in every detail, without regard, so to speak, to varieties of criminal experience.

The Warren Court, in short, took charge of the state of affairs and attempted to impose uniformity across the board. *Id.* at 104-05.

See also Douglas, *State Judicial Activism — The New Role for State Bill of Rights*, 12 SUFFOLK U.L. REV. 1123, 1140 (1978) (federalization of rights has resulted in a "withering" of state constitutional adjudication); Note, *The Warren Court: A Study of Selected Civil Liberties*, 20 U. FLA. L. REV. 201, 225 (1967) (although federal government may have gained nothing by incorporation of the Bill of Rights, states have nonetheless lost their formerly absolute discretion over their citizens' activities).

Federalism, however, does not function as designed when the state half of the dual model is inoperative.[47] As a result, states have recently ignored their historical role as "laboratories" where new ideas and concepts are forged.[48] In addition, states have often failed to pay serious attention to their own constitutions, even when decisions would more logically and readily flow from applying state law.[49]

Evidence of a change in the old habit of following the Supreme Court is beginning to surface. States that were dormant, even lazy, have begun to awaken, perhaps disturbed by the slow but steady erosion of individual liberties first provided by the Warren Court.[50] The reassumption of the states' proper role in the federalistic scheme may prove vital to preservation of individual liberties[51] and result in a resurgence of state law.[52]

III. THE ADEQUATE AND INDEPENDENT STATE GROUNDS DOCTRINE

A. *History*

The adequate and independent state grounds doctrine allows states to resolve issues on the basis of state law without being subject to Supreme Court review.[53] The doctrine is derived from article III of the Constitution, which states that judicial power extends "to all Cases, in Law and Equity, arising under this Constitution . . . ."[54] If

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47. *See* Brennan, *supra* note 5, at 503 ("Federalism is not served when the federal half of that protection is crippled.").

48. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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.").

49. *See* Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 385 (1984) (government has become "lopsided" and since rights are not taken seriously in Washington, neither are they taken seriously by the states); *see also* Dauer & Havard, *supra* note 20, at 6 (state law is so low in hierarchy of laws that state constitutions have suffered from a lack of esteem).

50. *See* Brennan, *supra* note 5, at 494-95 (state courts may disagree with trend of United States Supreme Court to pull back from *Boyd* principle, Boyd v. United States, 116 U.S. 616 (1886), whereby the Court was solicitous of the people's constitutional rights).

51. *See* Brennan, *supra* note 5, at 491 (without state law full realization of liberties cannot be guaranteed).

52. *See* Collins, *supra* note 49, at 376-77 ("As state courts reassert their proper role in our federalist system, we are likely to see less, rather than more, direct reliance on federal case law.").

53. *See infra* note 57.

54. U.S. CONST. art. III, § 2, cl. 1.

there is no case or controversy because the matter was decided on state grounds without violating the supremacy clause, then the Supreme Court lacks jurisdiction to review the decision.[55]

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55. *See* Schaffer, Harmon & Helbrush, *supra* note 4, at 21. The American model of a Supreme Court is very different from the model used in most European countries. *See, e.g.*, L. FAVOREU, LES COURS CONSTITUTIONNELLES 5 (1986), in which he states:

> In the American system, constitutional law is entrusted to the whole of the court system and is not distinguished from ordinary law in so far as all the cases, as long as the court has proper jurisdiction, are judged by the same courts, and appreciably in the same manner. The constitutional issue may be presented in all litigation, and it does not require special treatment. Actually, there is no constitutional litigation, any more than there is administrative or judicial litigation, because there is no reason to distinguish between the suits brought before the judge.

Id. (trans. by Note author). Thus the European system reflects a different philosophy, that of establishing the constitutional jurisdiction of a court outside the framework used in the system overall. In the United States, the Supreme Court sits at the apex of the judiciary, while in Europe the constitutional jurisdiction is vested in a separate court. *Id.*

In Germany, for example, the separate constitutional court is the Federal Constitutional Court. This independent court meets in Karlsruhe in two divisions, termed "senates," and decides conflicts between such entities as the federal government and the Länder, or between two Länder. *See* N. HORN, H. KÖTZ, & H. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 20-21 (1982) [hereinafter N. HORN]. This court interprets the German Constitution although it is not properly termed a court of appeal deciding constitutional issues arising from criminal or civil cases. Rather, the court has original jurisdiction in areas provided for in article 93 of the Basic Law. *See Documents on Politics and Society in the Federal Republic of Germany*, LAW ON THE FEDERAL CONSTITUTIONAL COURT 7 (1982); *see generally* Hahn, *Trends in the Jurisprudence of the German Federal Constitutional Court*, 26 AM. J. COMP. L. 631 (1978) (discussing the court's function, principles of interpretation and general direction). On aspects of the German court system, see Meador, *Appellate Subject Matter Organization: The German Design From an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981) (explanation of the German court system and possible beneficial applications to the American system). *See also* Riegert, *The West German Civil Code, Its Origins and Its Contract Provisions*, 45 TUL. L. REV. 48 (1970) (excellent review of historical development and organization of German Civil Code with special section detailing contract provisions).

The European system came about because of the work of the most famous positivist in this century, Hans Kelsen. *See* Kelsen, *On the Pure Theory of Law*, 1 ISRAEL L. REV. 1 (1966) (brief explanation of Kelsen's own philosophy of positive law and the basic norm). According to Favoreu,

> The European model, which today is known in ten or so forms, would not have existed without Kelsen. Through his work and through his drafting of the Austrian Constitution in 1920, the Master of Vienna put in place a new type of constitutional law, in opposition to the American model.

L. FAVOREU, *supra*, at 5 (trans. by Note author).

Thus, the Europeans rejected the American approach in favor of the system created by Kelsen. The primary reason for rejecting the American model of constitutional adjudication was its perceived "insufficient rigidity." *Id.* at 10. For European tastes, the United States Supreme Court simply was able to declare laws unconstitutional and unilaterally change the Constitution. To a European community accustomed to a positivist outlook dating back to Austin, this was totally unacceptable. *Id.* For general overviews of European and comparative constitutional

In the 1875 landmark decision of *Murdock v. Memphis*,[56] the Supreme Court held it would not review state court decisions containing a federal question if an adequate and independent state ground existed upon which its decision rested.[57] The Supreme Court set forth its policy on the adequate and independent state grounds doctrine in *Herb v. Pitcairn*.[58] Justice Jackson's majority opinion explained why state decisions on independent grounds should stand:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.[59]

This recognition of the division of power and the dualistic nature of federalism was crucial to the development of the state grounds doctrine.

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adjudicatory systems, see M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW (1979); C. EISENMANN, LA JUSTICE CONSTITUTIONNELLE ET LA HAUTE COUR CONSTITUTIONNELLE D'AUTRICHE (1928); L. FAVOREU & L. PHILIP, LE CONSEIL CONSTITUTIONNEL (3d ed. 1985).

56. 87 U.S. (20 Wall.) 590 (1875).

57. *Id.* at 635. *See* Judiciary Act of 1789, ch. 20, 1 Sta. 73 (current version at 28 U.S.C. §§ 1-2718 (1982)). Section 25 of the Judiciary Act stated:

> That a final judgment . . . in any suit, in the highest court of law . . . of a State, . . . where is drawn in question the validity of a treaty or statute of . . . the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of . . . any State, on the ground of their being repugnant to the constitution . . . of the United States, and the decision is in favour of such their [sic] validity, or where is drawn in question the construction of any clause of the constitution . . . , and the decision is against the title, right, privilege or exemption specially set up . . . by either party, under such clause of the said Constitution . . . , [the judgment] may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Id. § 25. *See also, e.g.*, D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 142 (1968) (highly probable that all questions passed on by state courts were reviewable by the Supreme Court); Schaffer, Harmon & Helbrush, *supra* note 5, at 21 (section 1257 does not limit court review to only federal questions).

58. 324 U.S. 117 (1945).

59. *Id.* at 125-26 (citations omitted).

The *Herb* Court also addressed how it should treat cases in which the decision did not clearly rest on state grounds.[60] In some such instances, the Court declined review, presuming state grounds were the reason for the state court decision. On other occasions, the Court remanded cases to the state court for further consideration.[61] The presumption that a state had adjudicated on adequate and independent grounds was a very strong one, even when the opinion conveyed the impression that the decision was based directly on federal law.[62] The reason for this deferential treatment was apparently to allow states to exercise their proper role in the dual system of federalism.[63]

Another problem considered in *Herb* was the situation in which a case involved both state and federal questions.[64] The state court would often discuss both questions together, and render a decision without distinguishing between the two. As a result, the Supreme Court could not determine whether state or federal law controlled the decision, and had no rational basis for either taking jurisdiction or abstaining.[65] The *Herb* Court respected state courts and therefore rejected a policy of simply telling the state court what it meant by its decision.[66] As later cases reveal, these basic tenets of the unreviewable state grounds decision and the division of federal and state powers broke down, leading many states to avoid the Supreme Court when its decisions invaded traditional state authority.[67]

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60. *Id.* at 126.

61. *Id.* at 126-27.

62. *See, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551 (1940). The Supreme Court noted that the Minnesota court cited no specific provision of its state constitution, and probably based its holding on the five cases it cited that relied on the fourteenth amendment. *Id.* at 554-55; *see also* International Steel & Iron Co. v. National Sur. Co., 297 U.S. 657, 662 (1936) (continuance granted to allow reargument in state court to clarify basis of the decision).

63. *See National Tea*, 309 U.S. at 557. The court stated:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications . . . not stand as barriers to a determination by this Court . . . . This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between this Court and state courts and is of equal importance to each.

Id.; *see generally* G. GUNTHER, CONSTITUTIONAL LAW 56-58 (11th ed. 1985) (state grounds may be either substantive or procedural, although it may be difficult to discern the independence of the decision).

64. 324 U.S. at 127.

65. *Id.* The Court wrote in terms of "interlaced" discussions without any "sharp separation" of the federal and state question. *Id.*

66. *Id.* at 128 (remanding may impose burden on state courts but is in their best interest since it protects state jurisdiction from Supreme Court interference).

67. *See supra* notes 10-18 and accompanying text.

B. Michigan v. Long

State courts have recently decided issues relying on their own constitutions, although they often appeared to rely on federal jurisprudence. Such decisions were insulated from Supreme Court review as long as some brief statement of independent state grounds was provided.[68] Apparently displeased with these unreviewable state court decisions,[69] the Supreme Court set out the new approach to the state grounds doctrine in *Michigan v. Long*.[70]

In *Long*, the defendant's car was searched before he was arrested and the Michigan Supreme Court suppressed marijuana found as a "fruit" of the illegal search.[71] Although the state court referred to its constitution twice, the Supreme Court noted that the main thrust of the opinion relied on federal law[72] and found jurisdiction for the case.[73] Justice O'Connor's majority opinion examined the Court's prior hand-

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68. *See supra* note 57.

69. *See* G. GUNTHER, *supra* note 63, at 58.

70. 463 U.S. 1032 (1983).

71. *Id.* at 1036-37. The metaphorical expression in full is "fruit of the poisonous tree," coined by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939). The doctrine may be viewed as an extension of the exclusionary rule, whereby evidence is excluded because it was obtained in an unconstitutional manner. The concept was advanced by Justice Holmes in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

There are three exceptions to the exclusion of evidence classified as "fruit." The first exception, attenuation, allows evidence to be used if a weak causal link exists between the illegality and the later legal discovery of evidence. *See, e.g.*, Taylor v. Alabama, 457 U.S. 687, 690 (1982) (6 hour lapse between illegal arrest and confession not enough to dissipate taint); Rawlings v. Kentucky, 448 U.S. 98, 108 (1980) (taint from illegal arrest attenuated because of so-called congenial atmosphere); Wong Sun v. United States, 371 U.S. 471 (1963) (demonstrates proposition that evidence need not be excluded on the mere basis of a "but for" causal link).

A second exception, inevitable discovery, allows illegally obtained "fruits" into evidence if it can be shown that the evidence would have been found even without the illegality. *See* Nix v. Williams, 467 U.S. 431 (1984) (illegally obtained statement of location of victim's body not suppressed since police would have found body without the statement within a few hours).

The final exception to the suppression of illegal fruit is the independent source rule. If authorities can show they could have legally obtained the evidence from another source, the tainted evidence need not be excluded. *See* Crews v. United States, 445 U.S. 463 (1980) (in-court identification admissible though arrest was illegal since police had independent sources to identify defendants).

See generally C. WHITEBREAD & C. SLOBOGIN, *supra* note 4, at 34-68 (general discussion of fruit of poisonous tree doctrine and exclusionary rule).

72. *Long*, 463 U.S. at 1037.

73. *Id.* at 1044.

ling of the state grounds doctrine.[74] First, the "ad hoc" method, whereby the Court remanded some cases and reviewed others, was rejected as inconsistent.[75] Next, the process of examining state law was discarded because it required the Court to interpret state law with which the Justices were unfamiliar.[76] Finally, the Court noted the "burden" of remanding decisions to the state court when independent state grounds were not clear.[77]

The Court rejected prior methods of dealing with the independent state grounds doctrine and decided to review decisions unless they clearly and expressly rested on state grounds.[78] The new test provides that:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[79]

The new test for the Court was drawn out of "respect for the independence of state courts" and a desire to avoid advisory opinions.[80] The Court also contended that asking for a clarification of the grounds for the decision was intrusive, and the presumption of federal grounds

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74. *Id.* at 1038-39 (Justice O'Connor examines state law and cites cases to show the different treatment accorded the issue, ranging from dismissal to remand). *Id.*

75. *Id.* at 1039.

76. *Id.* The Court states: "The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Id.* This vow of non-interpretation of state law is violated five pages later in the opinion when a thorough analysis of Michigan state law is undertaken, notwithstanding the Justices' general unfamiliarity. *Id.* at 1044-45 n.10; *see infra* note 85 and accompanying text.

77. *Id.* at 1040.

78. *Id.* at 1038-40.

79. *Id.* at 1040-41.

80. *Id.* at 1040.

would avoid this intrusion. The Court suggested that this practice would give states the opportunity to develop their own jurisprudence without Supreme Court interference.[81]

The decision in *Long* charted a new course for the adequate and independent state grounds doctrine. Prior to *Long*, the Court generally displayed caution in reviewing decisions arguably based on state grounds.[82] The new approach changed the presumption that a decision rests on state grounds to one that it does not.[83] If the face of the opinion fails to reveal an adequate state ground, the Supreme Court will now assert jurisdiction.

The rule will probably encourage state prosecutors to argue that state grounds are not truly independent, and that the Supreme Court should therefore take jurisdiction.[84] Should the Supreme Court agree to review in such cases, it will have to interpret state law. The majority opinion's willingness to examine state grounds in *Long*[85] may indicate that the Court will move toward a standard of general review in the future.[86]

Several of *Long*'s concepts require particularly close scrutiny. First, Justice O'Connor stated that an important need for uniformity in federal law went unsatisfied when the Court did not review opinions based on federal law.[87] Uniformity breaks down just as readily, how-

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81. *Id.* at 1041. The Court states:

> It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law.

Id.

82. *See supra* note 63.

83. *Long*, 463 U.S. at 1040-41.

84. *See* Collins, *supra* note 49, at 399-400 n.87 (discussing case in which the state argued the state court's grounds were not sufficient).

85. *Long*, 463 U.S. at 1044-45 n.10 (majority opinion canvasses in depth the Michigan Constitution and case law in determining the Supreme Court would have jurisdiction even without presuming the instant case rests on inadequate state grounds).

86. As Justice Stevens points out in *Long*, thirty years ago the Court reviewed only one case in which the state courts sought to reverse decisions in favor of a defendant's rights. *Id.* at 1069-70 (Stevens, J., dissenting). In the 1983 term, however, Justice Stevens remarked that states themselves had filed at least eighty petitions for certiorari. *Id.* at 1070 n.3; *see also* Wilkes, *supra* note 4, at 444-50. Wilkes, writing nine years before *Michigan v. Long*, speculates on possible narrowing techniques the Supreme Court could use to obviate the adequate and independent state grounds concept. *Id.*

87. *Long*, 463 U.S. at 1040. Justice O'Connor states dismissal is not a "panacea" because of the need for uniformity. *Id.*

ever, whether a state court diverges from the Supreme Court on state grounds or on federal grounds. For example, if the Michigan court had persuaded the Supreme Court that it had decided the case on the basis of the Michigan Constitution, resulting law would have been just as divergent as if the Court had not reviewed. Thus, when Justice O'Connor argues that such state decisions should be reviewed to insure uniformity, she in effect rejects the state branch of the dual federalism model,[88] and approaches in logic, if not in practice, a procedure of general review.[89]

In a second statement, the Court characterized continuance or remand to the state court for clarification as an unsatisfactory method of determining whether adequate state grounds existed. But the Court's reasons for the inadequacy of these methods were surprising. Vacation for clarification was termed a "burden";[90] remanding a case "intrusive."[91]

The Court's reasoning is difficult to follow. If state courts are free to adjudicate on the basis of their own state law as long as federal supremacy is not violated, a range of responses exists to resolve ambiguously grounded decisions. The Court could presume that state grounds existed, and refuse to take jurisdiction.[92] This model could be termed "deferential." Or, the Court could simply disregard the intent of the state court and conclusively presume the decision was decided on federal grounds.[93] This might be termed a "supremacy" model. The Court's decision in *Long* lies closer to the supremacy model than to the deferential model of former Supreme Courts.[94] While it has not yet arrived at the supremacy model, the Court's rationalization of *Long* as preserving "respect for the independence of state courts,"[95]

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88. *See, e.g.*, Brennan, *supra* note 5, at 503 (dual protections of federalism); *see also* Dauer & Havard, *supra* note 20 (federalism requires a division of power).

89. *See supra* note 87 and accompanying text.

90. *Long*, 463 U.S. at 1040 ("[T]hese methods of disposition place significant burdens on state courts to demonstrate the presence or absence of our jurisdiction.").

91. *Id.* at 1041 "[Reviewing a decision] also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court.").

92. The Court used to presume that state court decisions were independently grounded when a decision was not clear on the matter. *See supra* notes 62-63.

93. *See* Wilkes, *supra* note 4, at 449 (discusses unlikelihood of Supreme Court's revising the definition of "independent" to require state law be interpreted in accord with federal law).

94. *See supra* text accompanying notes 58-59.

95. *Long*, 463 U.S. at 1040. The Court stated: "It is precisely because of this respect for state courts . . . that we do not wish to continue to decide issues of state law that go beyond the opinion that we review . . . ." *Id. But see id.* at 1072 (Stevens, J., dissenting) ("I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show '[r]espect for the independence of state courts.'").

and relieving the state of burdens and intrusions, indulges in legerdemain.[96]

The *Long* test appears to be a mere cite-checking exercise, since references to state law are required to support an independently grounded decision.[97] As a result, state courts may be reluctant to rely

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96. Syllogistic reasoning would not posit a conclusion of "review" at the Supreme Court's jurisprudential gates. An examination of the Court's premise might suggest restatement as follows: "We have respect for state courts' independence and a desire to avoid advisory opinions construing their own laws." The Court's conclusion may be phrased in this manner: "To avoid deciding issues of state law, we will review their decision when we do not know whether state law is the basis for the holding. Moreover, since it burdens a state to request clarification, we will not attempt to discover whether we are reviewing state law, but will assume we are not."

Such an analysis signals that the Court has either improperly phrased its premise, or has misstated its conclusion. *See, e.g.*, A. WOLF, TEXTBOOK OF LOGIC 93 (2d ed. 1938), where he states:

> Sometimes an argument is really much stronger than it appears at first sight when the omitted but assumed links have not yet been interpolated. But at other times an argument in its abridged state may appear much stronger than it is when completed, because some of the suppressed premises may appear more doubtful when stated explicitly. In some cases an abridgment of an argument is due not so much to want of time as to lack of candour.

It seems likely the conclusion is the Court's true opinion, while the stated premise is not. A premise that would lead the Court to the desired conclusion might read as follows: "Federal jurisprudence should be primary in the hierarchy of rules and all decisions reached on grounds that can possibly be characterized as not independently based should be reviewed."

There is a tremendous array of opinion on what constitutes legal reasoning and the role of syllogistic or deductive logic in the scheme. *See* W. REYNOLDS, JUDICIAL PROCESS 110 (1980), which explains that legal opinions may use formal logic or inductive reasoning. *Id.* Most opinions are written in the form of syllogisms. *Id.* This form of reasoning is perilous in that it may lead to mechanical jurisprudence. Other forms of reasoning should be used, such as reasoning by analogy. *Id.* Perelman thinks legal logic is properly inductive, rather than deductive, and a logic of argumentation based on Aristotelian, dialectical proofs whose aim is to persuade the judge. Perelman, *What is Legal Logic?*, 3 ISRAEL L. REV. 1, 3 (1968). A common technique of legal argumentation is reasoning by analogy. *Id.* Levi considers legal reasoning to be a pattern of reasoning by example, from case to case. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949). According to Levi, reasoning is a three-step process of viewing the similarities between two cases, announcing the rule in the first case, and finally applying the rule to the second case. *Id.* at 1-2. The American Legal Realists, however, might question the utility of legal reasoning, given their generally skeptical outlook. In fact, the following words became the Realists' credo: "And rules . . . are important to you so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings." K. LLEWELLYN, THE BRAMBLE BUSH 14 (1930). What is important to the Realists is not what the judge says, but what the judge does. *Id.*

97. *See* Welsh, *supra* note 4, at 857 (Court's test for determining adequate state grounds is exercise in cite checking).

on federal precedent for fear of Supreme Court review. Thus, *Long* may have undermined the Court's goal of making state courts adhere to Supreme Court interpretation of federal law[98] by establishing an invasive policy that distorts the dual nature of federalism.[99] The Court's self-expanded jurisdiction may be a Pyrrhic victory that will ultimately prove costly in terms of reduced prestige, authority, and leadership.[100]

IV. THEORETICAL ARGUMENTS AGAINST STATE CONSTITUTIONAL INDEPENDENCE

To assess accurately the impact of state-based adjudication, it is helpful to examine the substance and validity of the most frequently articulated criticisms. Several of these criticisms have merit, and states advocating independent decisionmaking must respond. While other comments merely indicate disapproval of the dual system of federalism, states must also address these arguments in justifying to skeptics their right to decide on state grounds.

A. *Perceived Dangers of Independent Analysis*

Some commentators think that allowing states to adjudicate on the basis of their own constitutions frustrates the supremacy clause.[101] Because the Supreme Court cannot review decisions on adequate and independent state grounds,[102] these commentators contend, states can

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98. *See, e.g., id.* at 858 (applicaton of state grounds doctrine thwarts goals Court should seek to advance); *see also* Collins, *supra* note 49, at 403. Professor Collins writes:

> The signal the Court is sending to its state counterparts is that decisional certainty in vindicating rights will not occur unless state courts either abandon reliance on federal decisional law or openly repudiate any such reliance. True a state court may, under *Long*, employ federal law "for the purpose of guidance," but if it does it must comply with the formalisms imposed by the Court, and even then mechanical compliance may not be deemed "adequate" to preclude assumption of federal jurisdiction over the case.

Id.

99. *See, e.g.*, Welsh, *supra* note 4, at 857-58 (Court's definition of federalism leads to "bizarre" results and discourages state experimentation by a rigid formalism).

100. *See, e.g.*, Collins, *supra* note 49, at 407-08 ("In sum, *Long* and its progeny reveal that the present Supreme Court is not about to assume the dominant role in *protecting* individual rights. Thus, that responsibility could well shift to state courts."); *see also* Wilkes, *supra* note 4, at 450 (by lowering protections of individual liberties, state courts are "invited" to enlarge on federal protections).

101. *See, e.g.*, Bice, *supra* note 2, at 757.

102. *See supra* notes 53-67 and accompanying text.

improperly insulate their decisions and undermine federalism by letting federal issues go undecided.[103]

This argument has surface appeal, but proves deceptive on closer analysis. The supremacy clause does not require the federal branch to be supreme in all circumstances.[104] Although state courts are clearly subject to Supreme Court review on matters concerning the federal Constitution,[105] they are not subservient with respect to their own state constitutions.[106] State courts are the final and supreme interpreters of their own constitutions, and may interpret them in any manner not inconsistent with the federal Constitution.[107] Thus, to question the validity of state court adjudication on the basis of state constitutions in effect questions the validity of the state grounds doctrine, and argues for federal supremacy of all law.[108]

Other scholars express concern about states' abilities to evade Supreme Court decisions they dislike simply by deciding on the basis of

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103. *See* Bice, *supra* note 2, at 757. Bice states: "Thus the present operation of the adequate state ground doctrine allows a state court, which may not be motivated by any concerns of efficiency, to insulate its decisions from effective review by either the judicial or political processes for what may be a significant period." *Id.*; *see also* Bator, *supra* note 2, at 605 n.1: "I must confess to some misgivings about the extent to which . . . state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory."

104. *See, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 21 (3d ed. 1986) ("State courts are the final interpreters of state law even though their actions are reviewable under the federal constitution, treaties, or laws.").

105. *See* U.S. CONST. art. VI, cl. 2. The Court's power to review state decisions derived from Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Supreme Court voided a Georgia law that impaired the obligation of contract in article I). The second major case reviewing state law was Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Supreme Court asserted its right as final interpreter of Constitution and federal law). A third early case of major importance was Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821) (Federal Constitution superior to state sovereignty). Perhaps the most illustrative modern example of federal supremacy is Cooper v. Aaron, 358 U.S. 1 (1958) (governor and legislature of Arkansas refused to follow Court's desegregation order, and in response, Supreme Court forcefully reasserted its supremacy over states in federal law). *See generally*, J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 104, at 15-22 (overview of Supreme Court's review of state court decisions and theories of judicial review); Hall, *"Think Things, Not Words": Judical Review in American Constitutional History*, 35 U. FLA. L. REV. 281-95 (1983) (examination of judicial review of Supreme Court by historical period); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209-35 (1983) (surveys special theories of judicial review, which have accomplished less than is generally imagined at the expense of straining constitutional provisions).

106. *See supra* note 104, at 20.

107. *Id. see also supra* note 5 and accompanying text.

108. *See supra* notes 85-86 and accompanying text.

their own constitutions.[109] While it may be true that states disagree with particular Supreme Court decisions and seek refuge in their own constitutions, that action bears no impropriety.[110] Under both the relatively expansive interpretations of the Warren Court and the comparative retrenchment of the Burger Court, states avoided decisions with which they did not concur.[111] Independent state court adjudication therefore works both ways, favoring neither liberal nor conservative viewpoints, as long as states do not violate the federal Constitution.[112] Individuals displeased with the Warren Court might have favored independent state decisions at that time, while finding "evasion" disagreeable under the Burger and Rehnquist Courts.[113] But consistency demands that a practice be allowed or disallowed without reference to a particular philosophical orientation.[114]

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109. *See, e.g.*, Bice, *supra* note 2, at 757; *see also Developments in the Law*, *supra* note 32, at 1359 (commentators and judges uncomfortable with state decisions based on constitutions that disagree with Supreme Court holding).

110. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 104 and accompanying text.

111. "Evasion" of Warren Court decisions took place in the 1960s when certain states, mainly southern, viewed the Supreme Court as too expansive. *See* Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260, 283 (1972). Burger Court decisions were also avoided by states that disagreed with the Court's penchant for narrowing individual liberties. *See* Wilkes, *supra* note 4, at 425-26. Wilkes states: "Against the background of the Burger Court decisions, the evasion cases indicate that the nation is moving into a new period of federalism in criminal procedure in which the state-based rights of criminal defendants will assume increasing significance as federal-based rights play an ever-diminishing role." *Id.* at 426.

112. *See, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 104, at 20 (states can interpret their constitutions in any way that does not contradict federal law).

113. *See* Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275, 276 (1983) ("Judges are accused of illegitimate 'activism' when they decide cases which involve highly controversial and politicized issues. These accusations invariably come from individuals who disagree with the outcomes of those cases.").

114. The judicial system operates on the basis of neutral principles. *See, e.g.*, W. REYNOLDS, *supra* note 96, at 63: "Wechsler defined a 'neutral principle' as one that a judge would be willing to apply in all cases covered by the principle formulated by the court . . . . The phrase 'neutral principles' has become part of our tradition." *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing for adjudication on the basis of neutral principles); *see also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). Cardozo states:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles . . . . Wide enough in all conscience is the field of discretion that remains.

Id. According to Cardozo, therefore, the use of principles emphatically does not lead to mechanical jurisprudence.

Federalism is a dual system, with the federal element predominant at some times, and the state element at other times.[115] The argument against state-based decisions is simply an argument to tilt the power permanently in favor of the federal branch, leaving no buffer between the individual and the federal government.[116] The resulting federal minimum of protection,[117] however, might not always coincide with the demands of state residents who expect their rights to be based upon a reciprocally beneficial relationship.[118] The Supreme Court is not the only court capable of making correct decisions.[119]

State courts have also been criticized for using their state constitutions in a result-oriented and sporadic manner, only to avoid those Supreme Court decisions with which they disagree.[120] Decisions made on the basis of such convenience lack neutral criteria.[121] Although state courts should not decide similar cases differently without justification, the difficulty lies in determining when a court is holding on state grounds for convenience.[122] Merely to complain of a lack of neutral principles is not enough. A critic must show that the state court is insincere in holding on state grounds. What sincerity might mean is not clear. For example, is a court insincere when it finds that the state constitution requires a valid search warrant and disallows any searches made with defective warrants?[123] Does the motivation of the

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115. *See* Brennan, *supra* note 5, at 503 (federal system provides a dual source of protection); *see also* Schaffer, Harmon, & Helbush, *supra* note 4, at 20 (ability of states to expand rights is feature of the dual judicial system); Swindler, *supra* note 7, at 1 (constitutional history is "marked by a series of pendulum swings").

116. *See* Brennan, *supra* note 5, at 497.

117. *See* Swindler, *supra* note 7, at 1 (federal branch supplies the minimum and states the maximum protection of individual rights).

118. *See* Fuller, *supra* note 33, at 19-27.

119. *See* Williams, *supra* note 2, at 402 ("The United States Supreme Court does not have a monopoly on correct constitutional interpretation. This fact is a cornerstone of federalism, justifying substantive disagreement by state courts.").

120. *See, e.g.*, Galie, *supra* note 2, at 786 ("Justification for divergencies based solely on ideological differences, however, is more problematic."); *see also Developments in the Law*, *supra* note 32, at 1359 (courts and commentators have distaste for result-oriented decisionmaking).

121. *See* Galie, *supra* note 2, at 786 (decisions based on ideological grounds lack neutral criteria); *see also supra* note 114 and accompanying textual discussion of the concept of neutral principles.

122. If a state court says it is deciding on the basis of its constitution, it seems disingenuous to assume the opposite. *See supra* notes 58-59 and accompanying text.

123. *See, e.g.*, State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987) (based on state constitution, evidence obtained through defective search warrants inadmissible); *see also* Case Comment, *Constitutional Law: The Fifth Circuit's "Good Faith" Exception to the Exclusionary Rule — Well-Reached or Overreached?*, 33 U. FLA. L. REV. 300 (1981) (examines *United States*

holding really matter if the court is consistent?[124] As long as the state court is reasonably consistent, the criticism of a lack of neutral principles is groundless, and amounts to nothing more than a plea for consistency with federal case law.[125]

Critics omit the most perplexing aspect of this argument. If one assumes as a premise that state decisions lack neutral principles, what then is the conclusion? If the conclusion is to disallow state-based decisions, state constitutions are then rendered moot, inexorably changing the historical meaning of federalism.[126] In actual practice, state court decisions diverging from the Supreme Court are probably just as principled as other decisions, and once again the critics are those who disagree with the decisions. State courts do, of course, have a responsibility to explain the grounds for their decisions, but unless this is conspicuously absent from the opinion, there is little reason for concern.[127]

The claim that judges are "activist" when they resolve issues under state constitutions is a familiar one.[128] Critics have made this allegation both with regard to the United States Supreme Court, especially in

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v. Williams and development of exclusionary rule); *see generally* C. WHITEBREAD & C. SLOBOGIN, *supra* note 4, at 24-31 (discussion of "good faith" exception to exclusionary rule). *But see* United States v. Leon, 468 U.S. 897 (1984) (evidence produced by good faith reliance on an invalid search warrant admissible).

124. *See Developments in the Law*, *supra* note 32, at 1360 ("The quality of a court's reasoning is not determined by the kinds of factors that lead it away from the federal starting point."). Demonstrating intent or motivation always presents proof problems. *See, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 104, at 585-86 (difficulties with proving discriminatory purpose under equal protection analysis).

125. *See* Singer, *supra* note 113, at 276.

126. Such a conclusion might also be unconstitutional.

127. *See* Wilkes, *supra* note 4, at 448. Wilkes says that a general review of all federal and state decisions would be a great burden on the Supreme Court's case load and invade the "healthy federalism" required by the dual judiciary system. *Id.*; *see also* W. REYNOLDS, *supra* note 96, at 58-59. Reynolds points out a goal of written opinions is to "provide a check on arbitrary decisionmaking." *Id.* at 58. In addition, reasoned opinions promote certainty and provide notice of what the law is in a given instance, and what it should be in an analogous situation. *Id.* at 59; *cf.* Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982). Dworkin uses the figure of Hercules as a mythical judge powerful enough to contemplate a justification for a decision based on the totality of the legal order. *Id.* at 166. That is to say, a judge should attempt to reconcile his decision with the overall system of law. *Id.* The resulting decision will be consistent with the system and provide for unity of law. *Id.*

128. *See* Singer, *supra* note 113, at 276 (judges are accused of illegitimate activism); *see generally* Galie, *supra* note 2 (examines the four major areas in which courts are accused of being activist).

the Warren Court years, and individual state courts.[129] In this context, activism has a negative connotation and is scorned as an act beyond the proper power of the courts.[130]

Narrowly defined, elimination of "activism" can create unusual holdings completely at odds with legal intent and common sense. For example, in *Deem v. Millikin*,[131] the court was faced with the dilemma of either interpreting a statute beyond its express wording or allowing a child who murdered his mother to inherit her property.[132] Incredibly, the court decided that it could not undertake an enterprise it considered to be judicial legislation, and allowed the inheritance to stand.[133] Because the statute included no exceptions the court thought the legislature had intentionally precluded exceptions to the general rule that children inherit property of a parent dying intestate.[134]

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129. With regard to the Warren Court's activism, see A. BICKEL, *supra* note 46, at 103-04 (Warren Court quick to impose same norms on federal and state governments); Note, *supra* note 46, at 231 (judicial activism of the Supreme Court). A good deal of discussion has also been generated by state court actions. *See* Hancock, *supra* note 4 (three models of state court activism examined); Howard, *supra* note 16, at 878-79 (six areas of traditional state activity examined).

130. A fundamental tenet of the positivists is that judges exercise discretion where there is no law that directly resolves an issue. *See, e.g.*, H. HART, THE CONCEPT OF LAW 141-42 (1961). Hart, like Austin and other legal positivists, expresses a concern for the discretion of the judge. Judges are to follow the law, and reserve creativity for issues the law has not resolved. *Id.* With regard to judges' authority, Hart states:

> At any given moment judges . . . are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision . . . . Any individual judge coming to his office . . . finds a rule . . . accepted as the standard for the conduct of that office. This circumscribes, while allowing, the creative activity of its occupants.

Id. Thus, Hart perceives the rules of the game to be settled for the most part, and only action outside the rules takes on a creative favor. *But see* L. FULLER, *supra* note 33, at 87 (Fuller sees no dichotomy between following the law and exercising discretion, and states that both are "inescapably creative").

131. 6 Ohio C.C. 357 (Cir. Ct. 1892), *aff'd*, 53 Ohio St. 668 (1895).

132. *Id.* at 358. The court explained:

> The statute of descents provides in clear terms that where one dies intestate and seized in fee of lands, they shall descend and pass to the children of such intestate; and the courts cannot, upon considerations of policy, so interpret the statute so as to exclude from the inheritance one who murders such intestate.

Id. at 357.

133. *Id.* at 360. The court says when statutes are ignored, the result is judicial legislation in disguise. *Id.*

134. *Id.* at 361. The court stated: "The natural inference is that when [the legislature] incorporated the general rule into the statute, and omitted the exception, they intended that there should be no exception to the rule of inheritance prescribed." *Id.*

The *Deem* court criticized a similar case that disallowed murderers from inheriting an estate under any circumstances, although the statute in question listed no express exceptions.[135] The *Deem* court considered that decision a notorious example of a court invading the province of the legislature by improperly substituting its own opinion for the policy of the legislators.[136] This narrow, literal reading of a statute because of excessive adherence to the letter of the law is counterproductive, but is the end result of courts restrained from "activism."[137]

Any suggestion that courts should not venture beyond certain boundaries, lest they substitute their own wills for the will of the Supreme Court, belies a misinterpretation of the functions of state adjudication and the role of federalism.[138] Courts may not safely assume that all legislative intent is expressed on the face of the statute.[139] In fact, state courts have a positive duty to be activist, not only in fulfilling their obligations to the people of the state in which they sit,[140] but also in performing their role in our dual system of federalism.[141]

135. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

136. *Deem*, 6 Ohio C.C. at 360. The court stated: "The decision in *Riggs v. Palmer* is the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy." *Id.*

137. An early case, Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584), describes what has become perhaps the prime method of statutory interpretation, namely, a purposive interpretation. A four-step analytical framework assists in arriving at the interpretation of statutes in general. The considerations are as follows: what was the common law before the statute was made; what mischief and defect did the common law not provide for; what remedy did Parliament appoint to cure the disease; and the true reason for the remedy. *Id.* This type of purposive interpretation is endorsed by L. FULLER, *supra* note 33, at 82-83. Fuller states this is the best short answer to the question of how judges should interpret statutes in conformity with the whole legal system. *Id.* at 82. *See generally* W. REYNOLDS, *supra* note 96, at 192-286 (comprehensive overview of statutory interpretation with analysis of major theories).

138. *See supra* notes 1 & 5 and accompanying text.

139. The *Deem* court followed the Plain Meaning Rule. *See* W. REYNOLDS, *supra* note 96, at 215-20. The Plain Meaning Rule provides that as long as the language is "plain," no outside evidence such as legislative history should be admitted. *Id.* at 215. The problem is in determining when language is "plain." *Id.* at 217. Hart seems to think that language often has fixed meaning and is clear. *See* H. HART, *supra* note 130, at 122-32. Hart states, albeit with qualification: "In contrast with the indeterminancies of examples [precedents], the communication of general standards by explicit forms of general language . . . seems clear, dependable, and certain." *Id.* at 122. *But see* L. FULLER, *supra* note 33, at 227. Fuller disagrees with Hart's core of settled meaning of language. As an example of the difficulty of language, Fuller discusses the Statute of Frauds. *Id.* at 88-89. Fuller states that "few statutory enactments have given rise to so many discordant and bizarre interpretations." *Id.* at 88.

140. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 147 (1977) (a court applying, e.g., due process or equal protection clauses as law "must be an activist court," since it must answer questions of morality); *see also* State v. Coe, 101 Wash. 2d 364, 373, 679 P.2d 353, 359 (1984), where Utter states: "[S]tate courts have a duty to independently interpret and apply their state constitutions . . . ."

141. *See supra* notes 25-27 and accompanying text.

Another criticism holds that state courts do not have adequate experience in dealing with matters outside traditional state law and should therefore hesitate to "constitutionalize" new areas into their domain.[142] State courts, it is contended, do not have standards sufficient to guide them through the complexities of modern issues, and this lack of guidance becomes critical when state courts act as de facto legislative bodies.[143] Moreover, state constitutions may be imprecise in language and unclear in intent, leaving judges with little or no guidance.[144]

In truth, however, state courts have a great deal of experience with federal constitutional issues.[145] While adjudication under a state's own constitution may present some differences, the federal experience cannot be irrelevant. Nor have commentators shown that using state constitutions is so difficult a task as to be beyond the capacity of state judges.[146] On the contrary, many courts have developed and are utilizing clear-cut methodologies[147] to make independent, state-based determinations.[148]

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142. *See* Howard, *supra* note 16, at 942 (state judges should "strongly consider" social and other costs of constitutionalizing any area).

143. *Id.* at 943. Howard expressed reticence in allowing states to enter new fields:

> Another danger . . . is that invitations to a court to explore new terrain often entail the risk of going where there simply are no ascertainable standards to guide the judge. Natural law may be a great philosophical tradition, but it is a dubious guide for judges. When the Supreme Court embarked on its long and unhappy career as superlegislature in economic matters, it used what Justice Black often referred to as a "natural law due process" formula.

Id.

144. *See, e.g.*, Utter, *supra* note 5, at 521. Justice Utter points out that state constitutions are sometimes unclear, leaving no guidance for the judge. *Id.* While this may indeed be the case, Justice Utter does not urge states to stay their hand, but rather points out that many aids are available to judges. *Id.* at 492. Indeed, the Washington Supreme Court has been an especially avid advocate of interpretation based on the Washington Constitution. *See, e.g.*, State v. Chrisman, 100 Wash. 2d 814, 818, 676 P.2d 419, 422 (1984) (WASH. CONST. art. I, § 7 prohibits entering an arrestee's domicile without a search warrant); State v. White, 97 Wash. 2d 92, 112, 640 P.2d 1061, 1072 (1982) (en banc) (WASH. CONST. art. I, § 7 requires exclusion of evidence obtained under unconstitutional stop and identify statute); State v. Fain, 94 Wash. 2d 387, 391-92, 617 P.2d 720, 723 (1980) (WASH. CONST. art. I, § 14 prohibits life imprisonment of defendant with record of three minor felonies).

145. *See, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 104, at 20 (state courts review constitutionality of both state and federal laws).

146. *See generally* Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641 (1983). Justice Carson of the Oregon Supreme Court urges lawyers to adopt a procedure for preparing a case for trial and appellate review. *Id.* at 642.

147. *See, e.g., id.* at 653-63. Carson has sections describing the sequence, methodology, form, and research techniques that are available. *Id.*

148. *See supra* notes 6-8 and accompanying text.

Some writers seem to put far too much emphasis on federal guidelines and standards.[149] Courts' mechanically applying standards may increase certainty, but only at the expense of reason.[150] Standards serve as guideposts rather than as justice machines, and if states lack such mechanisms, so much the better.[151]

Dworkin advanced a theory of adjudication as "naturalism," not based on rigid standards.[152] A judge can decide new cases in a creative fashion, while building on existing precedents.[153] The judge first studies the work of other judges, which in our application might require a state court judge to review Supreme Court decisions if no state decisions were on point. The judge then reviews prior law to see what previous judges have done to continue the "chain of law."[154] This system of adjudication provides the working model for interpreting all types of cases coming before the court.[155] The interpretation is not a mechanical process, which Dworkin strongly objects to, but rather a style of adjudication for both routine cases and cases of first impression.[156]

This theory is important to federalism because the criticism of a lack of standards may be less important than it appears on the surface.

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149. *See, e.g.*, Howard, *supra* note 15, at 943; *see also Developments in the Law*, *supra* note 32, at 1357 (state court decisionmaking will lack cogency when federal protections are extensive).

150. *See supra* notes 131 & 135-37 and accompanying text.

151. *See, e.g.*, R. POUND, *supra* note 33, at 70-71. Pound says rules and standards have their basis respectively in intelligence and intuition. *Id.* at 70. If Pound is correct, then a lack of standards might not be as important as some critics of state courts suggest, since standards may be intuitionally based. Surely no reasonable claim that state court judges are less intuitive would be advanced. Pound continues to state: "For the certainty attained by mechanical applicaton of fixed rules to human conduct has always been illusory." *Id.* at 71.

152. Dworkin, *supra* note 127, at 165-73.

153. *Id.* at 168.

154. *Id.* Dworkin views the judge as having a responsibility to continue the case law developed in a consistent manner, a so-called "chain of law," much like a group of novelists writing a collective novel would have to pay great attention to all preceding chapters, lest the novel not be consistent. *Id.* at 166-68.

155. *Id.* at 171. Dworkin explains: "This account of the main structure of a working theory of interpretation has heuristic appeal. It provides judges, and others who interpret the law, with a model they might use in identifying the approach they have been using, and self-consciously to inspect and improve that model." *Id.* Dworkin understands his theory to reflect what judges already do, not what they might do or should do. According to Dworkin, the theory is indicative of the way the system works: "The rights thesis has two aspects. Its descriptive aspect explains the present structure of the institution of adjudication." For a discussion of the rights thesis, see *id.* at 82-90.

156. Dworkin, *supra* note 127, at 173 (judges can apply the model to both routine and non-routine cases).

Guidance from newly developed methodological approaches,[157] prior experience with federal constitutional issues, and a general framework of naturalism as Dworkin suggested[158] all mitigate any disadvantages from lack of prior adjudication.

Finally, one must note that state provisions are often different from federal provisions.[159] Even when both documents contain the same language, interpretation may differ.[160] A state provision may not have a federal counterpart, and thus courts may not be able to rely on federal decisions.[161] Under these circumstances as well, states would be best able to resolve issues by using the state rather than federal Constitution. In fact, some states, such as Florida, have built-in "reach-down" provisions that allow for quicker resolution of conflicts than the federal system.[162]

B. *Perceived Dangers in Diversity*

The American brand of federalism allows states to develop laws independent of the national government.[163] This distresses Justice

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157. *See* Carson, *supra* note 146, at 653-63 (suggested method for dealing with state constitutional issues).

158. *See supra* notes 152-56 and accompanying text.

159. *See, e.g.*, Williams, *supra* note 2, at 401 (state constitutional rights may be different, sometimes providing affirmative rights or judicial review).

160. *See id.* at 402-03. Williams points out that textual differences should not be viewed as a "condition precedent" to independent state adjudication. *Id.* at 402. In addition, sister state decisions should be given more weight than federal decisions under a horizontal federalism concept. *See id.* at 403.

161. *See, e.g.*, Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 188 (1983) (state constitutions may have rights with no federal analogue).

162. *See, e.g.*, England, Hunter, & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147, 193-96 (1980). The Florida provision allows the Florida Supreme Court to

> [r]eview any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

FLA. CONST. art. V, § 3(b)(5). The reason for creating the provision was to allow the state supreme court to decide important issues necessary for administration of justice. England, Hunter, & Williams, *supra*, at 195. A second reason for the reach down provision was to save time by pulling up the case to the supreme court. *Id.* The authors note that, in the Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974), the United States Supreme Court took jurisdiction from the District Court Judge, John Sirica, under a provision similar to Florida's section 3(b)(5). *Id.* (citing 28 U.S.C. §§ 1254(1), 2101(c) (1976)).

163. *See supra* notes 10-18 and accompanying text.

O'Connor because she desires uniformity of law.[164] Uniformity must be distinguished from consistency. When Justice O'Connor argues for uniformity, she wants the law to be same in each jurisdiction.[165] Consistency, on the other hand, pertains to a system whose laws do not contradict each other,[166] but fit together in the overall scheme of the system.[167] Thus, the legal system of an individual state may be internally consistent without being uniform with the laws of other states. Nor does our concept of federalism require uniformity for laws among the states.[168] Each state may develop laws in accord with the social morality of its own residents.[169]

The American legal system is uniform in one regard: federal protections are the inalterably mandated minimum for all states.[170] The states, however, determine the extent to which state protection of individual liberty may ascend, and in that regard state protections may vary.[171] The Continental Congress considered but rejected the possibility of having uniform constitutions for the states, in favor of each state's writing its own constitution.[172] Retaining state sovereignty was a prerequisite to adopting the federal Constitution, and is the cornerstone in American federalism.[173]

The resulting diversity, however, is not as great as one would imagine.[174] In fact, the similarity dates from the original period in

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164. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("[I]t cannot be doubted that there is an important need for uniformity in federal law . . . ."); *supra* text accompanying notes 87-89.

165. *Long*, 463 U.S. at 1041. Justice O'Connor's opinion expresses implicit concern for complexity of law by her desire to avoid the need to examine state law in testing the validity of the state grounds. *See id.*

166. *See, e.g.*, L. FULLER, *supra* note 33, at 65-70. One of Fuller's eight requirements for optimal legality in any system is consistency. *Id.* at 65. Avoiding contradictions in the law is a difficult task for a legislator, but to the extent it is achieved, legality is increased.

167. *See* R. DWORKIN, *supra* note 140, at 105-30. Dworkin uses Hercules, a superhuman judge, to fit laws into their proper framework so as to maintain a consistent system. *Id.* at 107.

168. *See* supra note 104 and accompanying text; *see also* Collins, *supra* note 49, at 420 (citation omitted) ("[S]imply because the United States Supreme Court has decided that some claim of right is not secured under the federal Bill of Rights does not mean, of course, that the same claim must fail under every other law in the land. That is the splendor of federalism.").

169. *See, e.g.*, L. FULLER, *supra* note 33, at 193 (criticizing the positivists for ignoring the social dimension of the interaction between the lawgiver and the citizens).

170. *See, e.g.*, Linde, *supra* note 23, at 395 (irreducible national standards are binding).

171. *See supra* note 5 and accompanying text.

172. *See, e.g.*, Linde, *supra* note 23, at 381 (politicians debated uniform constitutions for the states, but rejected the idea).

173. Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

174. *See* Williams, *supra* note 161, at 172 (state constitutions do not differ greatly).

which states wrote their constitutions.[175] Many constitutions use similar language, with similar effect on legal and governmental issues.[176] The present Supreme Court has encouraged, perhaps unintentionally, the diversity Justice O'Connor argued against in *Long*.[177] By reviewing state decisions where adequate and independent grounds are not clear,[178] the Court has encouraged states to use their own state law to avoid review, resulting in precisely the diversity the *Long* majority sought to prevent.[179]

A final criticism examined here is that state constitutional adjudication on independent grounds complicates the legal system.[180] Although the criticism is unquestionably accurate, this complexity may simply be the price of the dual system of federalism.[181] Since there are already fifty state constitutions and a federal Constitution, any additional complication should be worth the effort when the costs are weighed against the possible gains.[182]

The costs, of course, are the variation of rights in each jurisdiction, but the variation applies only to the upper limit of those rights.[183] The

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175. *See, e.g.*, Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 941 (1968). Grad wrote:

> The general similarity of all these early state constitutions is another circumstance worthy of remark. The ready acceptance of closely parallel institutions, formulas and political ideas, by communities so unlike each other in the life and habits of their people and in their industrial and commercial interests, was beyond the expectation of many of the best minds of the day.

Id.

176. *See* Williams, *supra* note 161, at 227.

177. *See supra* note 164.

178. *See supra* note 79 and accompanying text; *see also* Cover, *supra* note 1, at 224 ("The overarching of federal law has moved state judges to view federal law both as a growing constraint on the operation of state law and as a source of inspiration for the development of a state jurisprudence.").

179. *See* Welsh, *supra* note 4, at 822 (footnote omitted). ("Wittingly or unwittingly, the Burger Court's policy of reversing expansive state judgments plays into the hands of those who would impose greater political control on state judges.").

180. *See, e.g.*, Linde, *supra* note 24, at 393. Linde argues that state adjudication is beneficial, but clearly articulates the argument made by others: "Diversity between state and federal constitutional rights complicates the work of lawyers and courts, particularly below the state supreme court. The law is complicated enough. There is little to be gained in return for the trouble. The game is not worth the candle." *Id.*

181. *See* Linde, *supra* note 24, at 392 ("As lawyers we know well that individual rights differ from state to state. That is what a federal system means.").

182. *See also* Collins, *supra* note 49, at 372 (since 1970 more than 250 state court decisions raised ceiling of federally mandated minimums).

183. *See supra* notes 5-7 and accompanying text.

potential benefit of issue resolution under state constitutions is that states do not have to be satisfied with the minimal,[184] and presently shrinking, protections afforded by the United States Supreme Court.[185]

V. THE STATES' RESPONSES IN PRACTICE

States generally respond to the opportunity to resolve issues under their own constitutions in one of three ways: the dependent, "lock step" approach; the interstitial, "gap filler" method; or the independent means of analysis. The ramifications of using each of these methods is examined seriatim.[186]

A. *Dependent, "Lock Step" Approach*

The first method, here termed the dependent, or "lock step" approach, ties a state court's decisions on one or more issues to the jurisprudence of the United States Supreme Court. Florida has followed this method in the fourth amendment area and serves as an example of the lock step approach.

In 1982, Florida voters approved an amendment to the state constitution that has had major ramifications on criminal procedure and federalism.[187] The amendment begins with wording identical to the fourth amendment to the United States Constitution,[188] but includes

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184. *See supra* note 8 and accompanying text.

185. *See, e.g.*, Welsh, *supra* note 4, at 856 (footnote omitted) ("The Burger Court's brand of federalism, it would appear, only rewards one kind of state experimentation: experiments conducted in the service of narrowing rights.").

186. *See Developments in the Law*, *supra* note 32, at 1332-34 (identifying the three categories as Classical, Autonomy, and Supremacy).

187. FLA. CONST. art. I, § 12 (1968, amended 1982). The amendment reads in full as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

188. U.S. CONST. amend. IV. For comparative purposes the federal amendment reads as follows:

> 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

a statement that the right must be construed in conformity with the federal Constitution, as interpreted by the Supreme Court.[189] Thus, for better or worse, Florida now follows the Supreme Court's lead in the search and seizure area.

Analysis of the statute raises several questions about the application of the amendment.[190] First, if the Supreme Court reverses a prior fourth amendment holding or renders an unclear ruling, what then is the Florida law? Lower courts might justifiably ponder whether to follow the previous Florida Supreme Court holding, which was then in conformity with the federal ruling, or follow the new decision of the United States Supreme Court.[191] Such a dilemma confuses the present force of the law, potentially creating a law unconstitutional for lack of notice.[192] Ironically, the United States Supreme Court might find such a state decision unconstitutional for failure to give the proper notice required by procedural due process.[193]

In addition, state constitutional amendments are often the result of emotional public debate.[194] Since most state constitutions are easily

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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.

For a detailed discussion of the Florida amendment, see generally Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

189. FLA. CONST. art. I, § 12 (1968, amended 1982); *cf.* CAL. CONST. art. I, § 7 (1974, amended 1979) (on busing decisions California ties in its adjudication to Supreme Court).

190. *See generally* Linde, *supra* note 24, at 395. Linde would be reluctant to put the Bill of Rights to a referendum, and is relieved we do not have to do so. *See id. But cf.* Van Alstyne, *supra* note 105, at 218-19. Van Alstyne thinks the sentiment that the people do not believe in the Bill of Rights is "oversold." *Id.* at 219. In his view, part of the problem is that we view the Constitution with fear and analyze it like an exclusionary clause in an insurance policy. *Id.* This habit of being overly analytical of the Constitution's provisions is unhelpful. *Id.*

191. *See* Collins, *supra* note 49, at 403-04. Collins notes that procedural uncertainty from Supreme Court cases provides a shaky framework for state reliance on federal law. *Id.* Cases such as New York v. Quarles, 467 U.S. 649 (1984) (public safety exception to *Miranda*), and Massachusetts v. Sheppard, 468 U.S. 981 (1984) (good faith exception to the exclusionary rule), are vague enough that their holdings cannot easily serve as guides. *Id.*

192. *See, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 104, at 489 (notice and procedural due process).

193. *See generally* Comment, *Constitutional Law: The Belated Demise of a Vagrancy Statute*, 25 U. FLA. L. REV. 227 (1972) (analysis of procedural due process in light of *Papachristou v. Jacksonville*, 405 U.S. 156 (1972)).

194. *See* Williams, *supra* note 2, at 382 ("These amendments usually arise in emotional contexts, often in response to a decision concerning the rights of minorities, the powerless, or other unpopular people.").

amended, voters may react without adequate time for reflection and consideration of the issues, leading to adoption of provisions that do not work well in practice.[195] Florida may experience problems with its amendment if a future United States Supreme Court makes decisions Floridians dislike.[196] Florida politicians desiring to terminate the relationship with the Court might then find it difficult to convince voters to abandon the highest court in the land.[197]

State-based adjudication has become somewhat of a cause célèbre for the Court, with individual justices advocating one or the other viewpoint.[198] A particularly interesting case is *Florida v. Casal*,[199] in which the "campaigning practice" is unusually direct.[200] In *Casal*, the Florida Supreme Court used the state constitution to affirm suppression of a large quantity of marijuana found on a fishing boat.[201] Justice Burger was dissatisfied with the decision and expressly blamed Florida law rather than federal law for the "untoward result."[202] Although Justice Burger accepted the majority's determination that adequate and independent state grounds were present, he doubted that the Florida Constitution required suppression of the evidence[203] since the state's jurisprudence was tied to the federal Constitution's fourth amendment.[204] Justice Burger noted that the Florida court had "appar-

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195. *See, e.g.*, Galie, *supra* note 2, at 791 (state constitutions are relatively easy to amend).

196. *See, e.g.*, Linde, *supra* note 24, at 395. Linde notes the national version of constitutional protections may not always be what the nation would want. *Id.*

197. *See id.* Linde describes Supreme Court decisions as made "by the faraway oracles in the marble temple." *Id.* Florida may have to settle with the oracle.

198 *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 396 (1975) (Marshall, J., dissenting) (on remand the state may reach contrary resolution under state law); *see also* Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting) (citing to specific provision in Michigan Constitution to demonstrate how the state could have resolved the issue under state law); *see generally* Brennan, *supra* note 5 (saluting states' expansiveness in interpretation of rights).

199. 462 U.S. 637 (1983).

200. *See* Bator, *supra* note 2, at 606 n.1 ("I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court.").

201. *Casal*, 462 U.S. at 637.

202. *Id.*

203. *Id.* at 638. Justice Burger states: "I question that anything in the language of either the Fourth Amendment of the United States Constitution or Art. I, § 12, of the Florida Constitution required suppression of the drugs as evidence." *Id.*

204. *Id.* Justice Burger cited directly to the Florida constitutional amendment and incorporated the full amendment into his concurring opinion. *Id.*

ently" decided the case on independent state grounds,[205] which meant the Supreme Court lacked jurisdiction to review it.[206]

Chief Justice Burger again cited the Florida amendment and quoted the text in full.[207] After briefly discussing the Florida statute that led to the disapproved result, Justice Burger made the following surprising statement: "[W]hen 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."[208] The statement is surprising because it is tantamount to a wholesale rejection of the historical meaning of federalism.[209] Chief Justice Burger's language suggests that the Florida decision was irrational, and that the Supreme Court has a monopoly on proper adjudication.[210] Given the tenor of his opinion, it is difficult to understand why Justice Burger concurred.

In reviewing the dependent, lock step approach with Florida's constitutional amendment as an example, serious questions emerge relating to application. This method of tying state decisions to the federal branch is antithetical to federalism[211] and effectively breaches the duty of the state[212] to serve as the prime protector of individual liberties for state residents.[213]

B. *Interstitial, "Gap Filler" Approach*

The second response, the interstitial, or "gap filler" approach, is a hybrid of the dependent and independent approaches. Under the gap filler approach, a state court consciously decides to utilize its own constitution only if no United States Supreme Court decision has previously resolved the issue,[214] or if the Court's pronouncements are too

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205. *Id.*

206. *See supra* note 55 and accompanying text.

207. *Casal*, 462 U.S. at 638.

208. *Id.* at 639.

209. *See supra* notes 53-67 and accompanying text.

210. *See* Williams, *supra* note 2, at 402 (Supreme Court has no "monopoly" on correct constitutional decisionmaking).

211. *See, e.g., id.* at 404 (reliance on Supreme Court interpretation "constitutes an unwarranted delegation of state power to the Supreme Court and a resultant abdication of state judicial responsibility.").

212. *See, e.g.*, Linde, *supra* note 24, at 380 (state courts have primary responsibility of protecting those rights that impact on a citizen's everyday life, such as landlord-tenant rights and custody rights).

213. *See, e.g., id.* at 383 (since state constitutions were first in time and logic, states should always first consult own constitutions before federal Constitution).

214. *See, e.g., Developments in the Law, supra* note 32, at 1356 (the interstitial view fills open spaces in federal adjudication).

unclear to provide an answer.[215] The state renounces its own federalistic powers and submits to the judgment of the Supreme Court.[216] The federal minimum usually becomes the state's maximum as well under this approach, since the state does not attempt to build a coherent jurisprudential body of law based on its constitution.[217]

In practice, this approach is not very different from the dependent, lock step approach[218] because federal law is so pervasive that comparatively few gaps remain for a state willing to let the Supreme Court settle its law.[219] On the other hand, state constitutions can resolve many issues,[220] and foreclosing the option of considering state arguments dissolves the essence of federalism by abrogating the state's responsibility to provide the other half of the dual protection.[221]

C. *Independent Approach*

The final method is the independent approach. Under this practice, a state always looks first to its own constitution, and only reaches the federal Constitution when the issues cannot be resolved under state law.[222] This approach represents the trend, and the list of states looking to their own constitutions has grown dramatically in the last

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215. *See supra* note 191 and accompanying text.

216. *See Developments in the Law*, *supra* note 32, at 1357 ("For state constitutional law to assume a realistic role, state courts must acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions.").

217. *Id.* at 1358: "The state court's role is not to construct a complete system of fundamental rights from the ground up." *Contra* Linde, *supra* note 24, at 384: "But a state court should put things in their logical sequence and routinely examine its state law first, before reaching a federal issue."

218. *See supra* notes 187-213 and accompanying text.

219. *See, e.g.*, Brennan, *supra* note 5, at 489-90. Justice Brennan refers to 1933 when many federal agencies, which would have a profound impact on the nation's people, were created. *Id.* at 489. But prior to the expansion of federal law, states were for the most part unconcerned about federal law. *Id.* at 490; *see also* Linde, *supra* note 44, at 173-74. Linde points out that law students are educated almost exclusively in federal constitutional law, and are therefore often unaccustomed to dealing with issues under state law. *Id.*

220. *See, e.g.*, Collins, *supra* note 49, at 385 ("[S]tate judges have it within their power to render a wide cross section of final judgments based on state law . . . ."); *see also supra* note 24 and accompanying text (references to various protections provided by states).

221. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971). Justice 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.

Id.

222. *See, e.g., Developments in the Law*, *supra* note 32, at 1356-57 (refers to the approach as the "primacy" model); *see generally* Linde, *supra* note 24 (leading article on state-based adjudication).

decade.[223] Since the Supreme Court's decision in *Michigan v. Long* inadvertently encouraged independent decisionmaking, even more states will join the trend in the future.[224]

Washington[225] and Oregon[226] are among the states that try to resolve issues first under their state constitutions. Both states consider their constitutions the primary protectors of their residents' civil liberties.[227] In fact, these courts consider laws in the inverse of the order most courts follow: both states work from the bottom up.[228] The states first consider local laws, such as municipal ordinances and administrative regulations.[229] Next, the courts examine state laws, and finally, if the decision is still not resolved, they look to the federal Constitution.[230] This procedure, although perhaps different from the tenets of present legal education,[231] is both efficient and logical, since no federal question exists if state law protects the right.[232]

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223. *See* Utter, *supra* note 5, at 499 n.29. Utter lists a number of states that have enlarged individual rights beyond those of the federal government on the basis of their state constitutions. *Id.* The list, which does not attempt to be definitive, includes some 28 states, although now the list would certainly be longer. *See generally Developments in the Law*, *supra* note 32 (full listing of cases held under state constitutional provisions).

224. *See supra* notes 98-100 and accompanying text.

225. *See* Utter, *supra* note 4, at 524 (Washington judges have a duty to first examine rights under the state's constitution). For application of the state's policy, see generally State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) (limits search incident after arrest to area within arrestee's control); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980) (defendants charged with possessory crimes have automatic standing to challenge admissibility of evidence obtained in illegal search); Federated Publications v. Kurtz, 94 Wash. 2d 51, 615 P.2d 440 (1980) (press can be excluded from a pre-trial hearing to protect the defendant under the Washington Constitution).

226. *See* Carson, *supra* note 146, at 647-49 (explains four reasons for putting the Oregon Constitution first in examining constitutional issues). For application of the Oregon view, see generally State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982) (search reasonable under Oregon Constitution when relevant in light of all facts); State v. Scharf, 288 Or. 451, 605 P.2d 690 (1980) (after counsel is denied, breath test for intoxication not admissible); State v. Mendacino, 288 Or. 231, 603 P.2d 1376 (1979) (confession to psychiatrist before arraignment not admissible because of prior inadmissible confessions).

227. *See, e.g.*, Utter, *supra* note 5, at 524 ("The Washington Declaration of Rights is the primary guarantor of the rights of Washingtonians."); *see also* Carson, *supra* note 146, at 643 ("The Oregon rule is first things first.").

228. *See, e.g.*, Carson, *supra* note 146, at 642-43. Justice Carson suggests dealing with "Last Things Last." *Id.* at 642. The last thing is the United States Constitution. *Id.* at 645.

229. *Id.* at 643.

230. *Id.* at 644-45. Carson admonished Oregon practitioners: "If you practice in Oregon, do not *start* with constitutional issues . . . ." *Id.* at 643.

231. *Id.* (starting at the bottom of the ladder and climbing up is not the way most lawyers were trained).

232. *Id.* at 648 (look first at state constitution as a matter of constitutional logic); *see also* Linde, *supra* note 24, at 380 ("State bills of rights are first in two senses: first in time and first in logic.").

Courts can always justify state-based decisionmaking when the federal wording on point is different.[233] But even when wording in state and federal provisions is identical, state interpretation may reasonably differ.[234] In attempting to interpret a constitutional provision, the court will consider the intent of the framers.[235] Since states are more aware of the current attitudes of their residents, they are better able to decide intent and resolve issues in accord with the residents' ideals of justice and reciprocity.[236] As one writer pointed out, just because the drafters of a Northwestern constitution used wording identical to what the Eastern framers used in the federal Bill of Rights does not mean the intent was the same.[237]

Supreme Court Justices sitting in Washington, D.C. are necessarily removed from the activities of the states. State court judges, however, are more accountable to state residents because they are usually elected or appointed for a fixed term subject to reelection.[238] In fact, California voters recently reminded the nation of the power of popular accountability by ousting the Chief Justice of the California Supreme Court.[239]

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233. *See, e.g.*, Galie, *supra* note 2, at 785. Galie says the clearest justification for a state using its own constitution is when the language is different from the federal document. *Id.* Additional justification is given if the state has a history or tradition calling for a more expansive reading. *Id. But see* Linde, *supra* note 44, at 181. Linde does not believe textual differences are required for divergence from the Supreme Court. *Id.*

234. *See, e.g.*, Brennan, *supra* note 5, at 500 (examples "abound" of states not following the Supreme Court though texts identical); Swindler, *supra* note 7, at 15 (identical language in two texts need not require same interpretation); *see also supra* note 8.

235. *See supra* note 137.

236. *See, e.g.*, Williams, *supra* note 2, at 400 (state courts are closer to state affairs); *see also supra* note 33 (explanation of "reciprocity").

237. Utter, *supra* note 5, at 498.

238. *Developments in the Law*, *supra* note 32, at 1351-52; *see* Williams, *supra* note 2, at 400 (state courts more accountable than federal courts); *cf.* N. HORN., *supra* note 55, at 38-39. German judges are appointed with the close involvement of both chambers of the Federal Parliament. *Id.* at 39. Each chamber selects half of the judges for the Federal Constitutional Court, while judges for the highest courts of ordinary jurisdiction are appointed by joint panels from both chambers. *Id.* The Basic Law stipulates that judges are independent and subject only to the law, and may not be dismissed against their will except as allowed by the Law on the Judiciary. GRUNDGESETZ [GG] art. 97 (W. Ger.). Although it would seem German judges are almost totally independent, this is not the case. *See* N. HORN, *supra* note 55, at 39. Since the judiciary is a career service in Germany, judges begin in courts of first instance, and advance from there. *Id.* at 37-38. Promotion, however, is dependent upon the judge's performance, and if his decisions have been poorly reasoned, he will probably not advance. *Id.* at 39.

239. *See Time*, Feb. 26, 1987, at 67.

Overall, the independent approach taken by an increasing number of states best preserves the meaning and purpose of federalism.[240] By allowing each state to decide independently what protections it will provide, rather than merely parroting the views of the Supreme Court,[241] state residents receive the benefit of the dual protection of federalism,[242] and have a judiciary that is both accountable to them and mindful of their special history, culture, and tradition.[243]

VI. RECOMMENDED APPROACHES

A. *For States*

'Federalism is not the exclusive domain of the federal government.'[244] States have a responsibility to resolve independently issues confronting their own residents, without waiting passively for signals from Washington.[245] The history and culture of each state is different, and state courts are in the best position to resolve matters concerning local residents.[246]

States should always examine state law before turning to the federal Constitution.[247] In many cases, state law will resolve the issue and the court will not need to consider the federal issue.[248] A methodology of approaching issues from the local level, to the state level, and finally to the federal level is the most logical and efficient means of resolving conflicts.[249]

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240. *See, e.g.*, Collins, *supra* note 49, at 420 ("There is a role, an important one, to be played by the states in securing freedom. During the course of this decade we are likely to see more responsibility placed on the shoulders of state officials, including state judges.").

241. *See* R. DWORKIN, *supra* note 140, at 250. According to Dworkin, a moral conviction cannot be based on prejudice, mere emotions, rationalization, or parroting. *Id.* Parroting is defined as citing the moral beliefs of others without relying on one's moral conviction. *Id.* Thus, decisions of the Florida Supreme Court on issues constitutionally tied to decisions of the United States Supreme Court might not qualify as moral positions.

242. *See, e.g.*, Brennan, *supra* note 5, at 491 (without "independent protective force of state law," full rights not assured).

243. *See, e.g.*, Utter, *supra* note 5, at 498 (differences in culture and local conditions of State of Washington from the east coast suggest documents with same language reflect different philosophies).

244. *See* Brennan, *supra* note 1, at 227 (states are not mere provinces).

245. *See, e.g.*, Utter, *supra* note 225 (duty to examine rights under state constitution).

246. *See* Williams, *supra* note 2, at 400, and accompanying text.

247. *See, e.g.*, Linde, *supra* note 24 (state law is first in time and logic).

248. Linde, *supra* note 24, at 383 (when a state protects a right there is no federal issue).

249. *Id.* at 384 (state law should be examined in logical sequence, before the federal Constitution).

While all states must adhere to the minimum, or lowest common denominator of protections provided by the federal Constitution,[250] the maximum is the exclusive concern of the states.[251] In *Michigan v. Long*,[252] the Supreme Court demonstrated a willingness to review state decisions that were formerly unreviewable under the independent grounds doctrine.[253] State courts must therefore take special care to meet *Long*'s mechanical test by declaring clearly that state law is the ground for the decision and that any federal references are used merely for guidance without compelling the result.[254]

Independent state decisionmaking faces two potential obstacles. First, *Michigan v. Long* does not rule out an evaluation of the veracity of the state ground declaration,[255] and until the Court's actions demonstrate conclusively that they will not undertake such an evaluation, the most prudent course of action would be for a state court to omit from the face of its opinion references to federal decisions. Second, states should treat all reversals as remands by the Supreme Court, and freely affirm on state grounds.[256] In all situations, states must utter the magic words to prevent what many think is an unwarranted intrusion into state affairs.[257]

Florida courts in particular should begin to give greater consideration to the state constitution. While the state appears locked in for the present to Supreme Court jurisprudence on search and seizure under the fourth amendment,[258] the state should ultimately attempt to repeal the amendment that short circuits independent thinking. Even if the constitutional amendment is not repealed, state courts can still decide issues on the basis of Florida law, as the Florida Supreme Court did in *Florida v. Casal*.[259] Of course, on other issues, the courts

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250. *See supra* text accompanying note 41.

251. *See supra* note 5 and accompanying text.

252. 463 U.S. 1032 (1983).

253. *See supra* text accompanying notes 82-83.

254. *See supra* text accompanying note 79.

255. *See, e.g.*, Collins, *supra* note 49, at 400 n.87 (*Michigan v. Long* invites argument that state grounds, though clearly stated, were not sufficient for the decision in seeking Supreme Court review of a case).

256. *See* Roberts, *supra* note 40 ("As a practical matter, if a state court decision provides greater protection under the federal law than the federal constitution requires, and the decision is set aside by the United States Supreme Court, the original state decision may nevertheless be reinstated on an independent state ground.").

257. *See* Welsh, *supra* note 4, at 857-58.

258. *See supra* note 187 and accompanying text.

259. 462 U.S. 637 (1983); *see supra* text accompanying notes 199-210.

are completely at liberty to decide cases in a manner that reflects the state's unique history, culture, and ecology.[260]

B. *For Practitioners*

Practitioners should follow the cogent advice of criminal defense lawyers and "take the first door out."[261] Taking the first door out means making all fair arguments for a client rather than advancing arguments in hope of achieving a landmark decision.[262] The saying is especially applicable in the constitutional area, for lawyers should not pass over local and state law in rushing to the federal Constitution. Arguments presented on the basis of the state's own constitution will carry considerable weight in many jurisdictions, and provide another opportunity for a door out.

Attorneys should be especially mindful of the fact that federal and state rights are not necessarily identical, even when the language in the state document is exactly the same as the federal provision.[263] Lawyers should frame arguments under each document, for what may fail on federal grounds may succeed on state grounds.

The trial court is the forum to present state constitutional arguments, since courts generally will not review issues raised for the first time on appeal.[264] Attorneys should support state arguments with relevant, independent decisions and emphasize special state characteristics favoring resolution under state law. Lawyers should try to present with great clarity any issues framed under state law, especially for judges unaccustomed to dealing with the state constitution. Judges will often be unaccustomed to addressing state arguments in areas where the United States Supreme Court has been especially active.[265]

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260. For recent developments regarding hazardous waste in Florida, see generally Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: Necessity for an Active State Role*, 34 U. FLA. L. REV. 635 (1982) (need for state to take active role in protecting residents from hazardous waste sites not considered top priority by Environmental Protection Agency); *see also*, Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253 (1986) (Florida law imposing strict liability on innocent purchasers for hazardous waste abatement should be changed to eliminate injustice).

261. Carson, *supra* note 146, at 643.

262. *Id.*

263. *See, e.g.*, Linde, *supra* note 24, at 382 (fourteenth amendment has led many to believe a "state's own guarantees must reflect whatever the United States Supreme Court finds in their federal analogues").

264. *See, e.g.*, Carson, *supra* note 146, at 642.

265. Linde, *supra* note 24, at 387. When state courts deal with claims not covered by federal law, they are accustomed to making an analysis under state law. *Id.* But in areas where the Supreme Court has been active, lawyers have not made arguments under the state constitution, and judges have abandoned use of the state document. *Id.*

A final consideration is important to all practitioners: omitting state law arguments may serve as grounds for a malpractice suit. Especially in jurisdictions that commonly hear arguments under the state document, failure to at least raise the state protection may prove detrimental.[266]

In addition to approaches that apply in the rest of the country, Florida practitioners should recognize the opportunity to advocate adoption of state grounds even in the fourth amendment area. *Florida v. Casal*,[267] for example, should have been a difficult case to win. The Supreme Court decisions were clear, and looking at the face of Florida's constitutional amendment, prior federal decisions should have settled the case. The state, however, found independent grounds by turning to a Florida statute.[268] Why a state statute should override the constitutional amendment is manifestly unclear, but the result was an adequate and independent state decision that temporarily cut the tie to the United States Supreme Court decisions.[269]

The importance of *Casal* is that the Florida court chose to break from the Supreme Court in a difficult case. It would have been much easier to decide on independent state grounds when textual differences existed between federal and state provisions.[270] For example, Florida's Constitution has an extra protective clause in article I, section 12 that has no fourth amendment counterpart.[271] A Florida court could more easily justify an independent decision on the fact that the federal amendment does not address the issue.

Casal signals clearly to Florida practitioners to argue state law in all cases, including search and seizure law. Florida attorneys should also bring to the court's attention ambiguities in Supreme Court adjudication, and special Florida circumstances that make applying the federal law undesirable.

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266. *See, e.g.*, Collins, *supra* note 49, at 374 (omitting state constitutional arguments is at the edge of malpractice).

267. 462 U.S. 637 (1983).

268. *See id.* (Burger, J., concurring); FLA. STAT. § 371.58 (1977). The statute allows a safety inspection only with consent or probable cause. *Contra* United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (Federal case law, pursuant to 19 U.S.C. § 1561(a) (1982), allows inspection at any time).

269. *Casal*, 462 U.S. at 637.

270. *See supra* note 233.

271. FLA. CONST. art. I, § 12 (1968, amended 1982) (extra clause protects against "unreasonable interception of private communications by any means"); *see supra* note 187 for full text of the amendment.

VII. CONCLUSION

A realignment of the historical meaning of federalism is well underway. States that once passively and mechanically accepted United States Supreme Court jurisprudence have begun to explore their own constitutions as a means of providing their residents with that vital second layer of protection. States do not have to accept federally defined minimum rights as the maximum rights for their residents.

Although the Supreme Court has recently expanded review of state court decisions, states may make a clear statement of adequate and independent grounds and disavow reliance on federal law. In this manner, states may be able to contain further federal intrusion into their interests.

The states will reassume their proper role in the American model of federalism, and federal law will cease to be the beginning and end of constitutional analysis. While states emerge as the new protectors of civil liberties, federal law will lose its position of primacy.

Stephen F. Aton