State Constitutions and Criminal Procedure: A Primer for the 21st Century

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Special Project

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I
Overview of State Constitutional Law
A. Modern Development

Like many areas of the law which have tumbled into existence to grapple with unexpected shifts in American history, state constitutional law has become the sudden subject of fanfare and scholarly pageantry in the 1980s. Once treated as a hasty footnote to the overshadowing body of constitutional doctrine crafted by the United States Supreme Court, the decisions of the fifty states under their own constitutions have nudged their way into a position of

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This Article is dedicated to the proposition that the research and writing of students can be transformed into useful legal scholarship for the advancement of the profession they will one day enter.

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potential permanency in American jurisprudence.\textsuperscript{1}

States have had their own constitutions for years, granted, and many of the Original Thirteen Colonies can boast of constitutions which predated the U.S. Constitution by almost ten years. The state constitutions of at least eleven of the original colonies were drafted and adopted in the midst of the fight for independence, unlike the U.S. Constitution, which was ratified ten years later in the quiet aftermath of the Revolution.\textsuperscript{2} The first state constitutions therefore served an extremely vital function. They represented a rallying point for the frightened colonists—a symbol of self-determination in the midst of a revolt that threatened to lead the forefathers to the gallows pole for treason. In his personal diary, James Madison wrote that he believed the true act of independence occurred on May 10th, 1776, rather than on the date of formal Declaration on July 4th, 1776.\textsuperscript{3} This was because May 10th marked the date the Second Continental Congress issued a secret memorandum to the Thirteen Colonies, urging them to adopt their own, separate constitutions. It was this risky declaration of self-determination, Madison believed, which showed the colonists’ final resolve to break ties with the British.\textsuperscript{4}

During the entire Revolutionary period, state constitutions thus served to solidify and reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists. Indeed, some of the earliest state constitutions—most notably Penn-

\textsuperscript{1} Much of the impetus for this renewed interest in state constitutional law can be traced back to a 1977 article by Justice William J. Brennan, Jr., urging state court jurists to make use of their own constitutions as independent sources of civil liberties rather than blindly adhering to the rulings of the U.S. Supreme Court. See Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). For other early articles advancing the autonomy of state constitutions, see Linde, Without “Due Process”: Unconstitutional Law in Oregon, 49 Or. L. Rev. 125 (1970); Ziegler, Constitutional Rights of the Accused—Developing Dichotomy Between Federal and State Law, 48 Pa. B.A.Q. 141 (1977), Project Report, Toward an Active Role for State Bills of Rights, 8 Harv. C.R.-C.L. L. Rev. 271 (1973).

\textsuperscript{2} New Hampshire, South Carolina, New Jersey, Delaware, Pennsylvania, Maryland, and North Carolina adopted constitutions in 1776. Georgia, New York, and Vermont followed suit in 1777. Massachusetts ratified its constitution in 1780 after receiving the approval of the electorate. Connecticut and Rhode Island did not formally adopt new constitutions until 1818 and 1842, respectively. Until that time these two colonies treated their pre-Revolution English Charters as independent sources of law.

For a list of the dates on which each of the fifty states adopted their own constitutions, see Council of State Governments, The Book of the States 14 (1986-87).

\textsuperscript{3} See W. Adams, The First American Constitutions 61 (1980).

\textsuperscript{4} Id.
sylvania's\textsuperscript{5}—were among the most radical, ambitious, pro-popular-democracy documents ever drafted in the history of mankind. In later years, the drafters of the U.S. Constitution borrowed heavily from the constitutions of the Thirteen Colonies, largely because many of the individuals who authored these early declarations later emerged in Philadelphia at the Constitutional Convention.\textsuperscript{6} As a result, the Bill of Rights, which stands at the cornerstone of American jurisprudence, owes its origin to similar guarantees contained in the earlier state constitutions.\textsuperscript{7}

Once the Revolutionary period passed, however, and the Articles of Confederation met their demise, the states quickly became stabilized under a centralized federal government with its own constitution, and its own bill of rights. Beginning in the 1790s, it became much more difficult to point to any solid, coherent body of law developing under the state constitutions. The record, as one flips through the decisions of the early state courts, during the 19th, and early 20th centuries, tends to be spotty and uninspirational at best. The states were far from hotbeds of constitutional activity. Partly this was because the day-to-day issues of small-town America—cotton, corn, and the growing industrialization of American society—inherently took precedence in the minds of most local jurists of the day. Partly it was because state courts were generally more lethargic than their federal counterparts, and subject to the winds of local bias and political pressure, when it came to issues of civil rights and criminal procedural guarantees.

This lethargy became most pronounced in the time-period between the 1930s and the 1970s. During this period the U.S.

\textsuperscript{5} Pennsylvania adopted its constitution in 1776. See Council of State Governments, supra note 2, at 14.

\textsuperscript{6} See Brennan, The Bill of Rights and the States, in The Great Rights 67 (E. Cahn ed. 1963). The Pennsylvania Declaration of Rights was the "direct precursor" of the freedom of speech and press. See I R. Schwartz, The Bill of Rights: A Documentary History 262 (1971). The Delaware Declaration of Rights prohibited quartering of soldiers and ex-post facto laws. Id. at 276-78. Maryland's 1776 Declaration prohibited bills of attainder. Id. at 279. North Carolina's Declaration of Rights provided a number of rights to the criminally accused—the right to trial by jury, a privilege against self-incrimination, and others—which later appeared in the U.S. Constitution. Id. at 286-88.

Supreme Court began gradually incorporating the Federal Bill of Rights, and applying them to the states through the fourteenth amendment. As a result of these federal decisions, the Supreme Court applied to the states the "minimum" standards established by the first, fourth, fifth, sixth, and eighth amendments of the U.S. Constitution. This in large part relieved the states of the obligation of having to construct their own constitutional frameworks.

The "renewed interest" in state constitutional law which has swept the country during the 1980s, then, is much more than a nostalgic return to the past. Rather, the modern activity under state constitutions has surpassed any previous incarnation of this phenomenon, with the possible exception of the American Revolutionary period itself.

Perhaps the most unique aspect of this fresh body of law as it surfaces in the 1980s is that it has been largely crafted by judges—both state and federal—who have taken time to step down from the bench and momentarily assume the caps of legal scholars. An enormous amount of the literature and research which has guided the evolution of state constitutional law has come from state supreme court justices, federal judges, members of the U.S. Supreme Court, and a host of other judges from every corner of the country.8 Such

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an aggressive role in the scholarly arena—a concerted effort by both federal and state judges to guide the formation of a new body of law—is virtually unparalleled in American history. This in a sense imbues state constitutional law with a unique sort of legitimacy and luster. In a very real sense, this new corner of constitutional jurisprudence has been coaxed out of gestation by the very judges who ultimately have the duty of safeguarding the constitutional rights at issue. It therefore gains a special sort of value; a unique sort of historical promise.

The reason for this sudden rekindling of interest in state constitutions is somewhat abstruse. Some observers regard it as a blunt reaction to the conservative decisions of the Burger and Rehnquist Courts. Others attribute it to the grand theory that states are ideally suited to serve as "laboratories," where new ideas may be experimented with until they are perfected and adapted at the federal level. Each of these theories is true; yet each falls short in its oversimplification. Any full explanation of the rising importance of state constitutional law must first pay respect to the broader sweep of American legal history which provides its backdrop.

Many areas of law which lawyers and judges take for granted...
today, for instance, vast areas of administrative law, labor law, and
the law of intellectual property, are relatively modern inventions of
jurisprudence which owe their origins to societal changes wrought
in the 20th century. New pockets of activity in each of these areas
of the law emerged to confront and contend with sudden changes in
American history. The modern body of law dealing with labor rela-
tions owes its existence to the rapid industrialization of American
society at the turn of the century; administrative law took on a
new focus in the 1960s and 1970s, adding whole new areas to the
casebooks, in response to the swift growth of federal and state gov-
ernmental regulations; the law of intellectual property has devel-
oped at a remarkable rate, mirroring the ongoing transfiguration of
American society from a country of steel mills and rubber factories
to a nation of computer programs and artificial intelligence.

State constitutional law, in a similar sense, has become a neces-
sary addendum to American jurisprudence in the 1980s. For the
first time in the history of the United States, state courts are collect-
ively more active in the area of civil rights and criminal procedure
than the U.S. Supreme Court. The state courts have switched roles
with the federal courts. Historically, it has been the state courts
which have taken a less aggressive role in protecting individual lib-
erties, particularly in the criminal realm, while the U.S. Supreme
Court has been forced to intervene and set minimum standards for
the states' respective citizens. For the first time in American his-
tory, the states are flexing their muscles with respect to individual
rights, while the U.S. Supreme Court has quietly taken a back seat.

This sudden emergence of a coherent body of state constitutional
law also owes its existence partly to the United States Constitution
itself. The gradual re-emphasis of the doctrine of "Federalism" and
"States Rights" at the federal level—both by the U.S. Supreme
Court and by the executive branch—has resulted in an interpreta-
tion of the U.S. Constitution which has purposely left a great deal of
decision making to the states. This "erosion" of the liberal deci-

11 See generally M. DUBOSKY & F. DULLES, LABOR IN AMERICA: A HISTORY (4th
ed. 1994); P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY (1964).
12 See generally Stewart, The Reformation of American Administrative Law, 86
13 See generally CONGRESS OF THE U.S., OFFICE OF TECHNOLOGY ASSESSMENT,
INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION
57-154 (1986); M. EPSTEIN, MODERN INTELLECTUAL PROPERTY 195-218.7 (1984).
14 See Monk, State Constitutionalism: Both Liberal and Conservative, 63 TEX.
L. REV. 1081, 1097 (1985) ("[S]ome of the more aggressive conservative political and
influential groups have demanded a return to basic federalism. They have taken seriously the

sions of the Warren Court era is not necessarily a catastrophic event for the future of civil rights in this country, as some commentators lament. Rather, it may more fairly reflect the policy inherent in our federal system that the states should guard the national storehouse of individual liberties with whatever zeal and home-spun originality they see fit.

Therefore, it is not helpful to view the rebirth of state constitutional law as good or bad, liberal or conservative. It is simply one component of an evolving legal system—a development whose full impact on American jurisprudence cannot yet be measured.

Perhaps the greatest and most immediate impact of state constitutional law has been in the area of criminal law and procedure. This should come as no surprise, since a significant portion of the U.S. Bill of Rights protects the rights of the criminally accused. Thus, to the extent that the nation has experienced a gradual shifting towards increased federalism and a deemphasis of the U.S. Supreme Court's involvement under the Federal Constitution, the necessary corollary has been an increased activity under the individual state constitutions.

Loosely expressed by President Reagan—originally when he was Governor of California—that the closer government is to the people at the state and local level, the more effective it is is representing the people's viewpoint.

For early examples in which the Burger Court refused to extend civil rights at the federal level, see Stone v. Powell, 428 U.S. 458, 491-94 n.35 (1976); Paul v. Davis, 424 U.S. 693, 710-12 (1976); Hicks v. Miranda, 422 U.S. 348, 358-59 (1975).

In Prime Yard Shopping Center v. Rebbian, 447 U.S. 74, 81 (1980), Justice Rehnquist, writing for the majority, refused to extend the free speech provisions of the first amendment to private shopping centers, but declared that the Court's earlier decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), "does not in its propriety preclude the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."

"Moss, State Constitutionalism: Both Liberal and Conservative, 63 Tex. L. Rev. 1081, 1083 (1985)."

"According to a recent survey by Collins, Galke and Kincaid, approximately 75% of the judges and justices of state high courts stated that state constitutional claims were raised most frequently in criminal cases. Collins, Galke & Kincaid, State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey, 13 Hastings Const. L.Q. 599, 613 (1986)."

"The supremacy clause does not prevent states from employing their own constitutions to expand the rights guaranteed by the U.S. Constitution. As Justice Pollock of the New Jersey Supreme Court recently wrote: "The first ten amendments [of the U.S. Constitution] establish a foundation for the protection of human liberty. A state may not undermine that foundation, but its constitution may build additional protections above the federal floor."

Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 65 Tex. L. Rev. 977, 980 (1987); see also Collins & Galke, Models of Post-Incorporation Judicial Review: 1985
Although state constitutional law has begun to flourish in many areas of civil liberties—freedom of speech,\textsuperscript{18} abortion funding,\textsuperscript{19} separation of church and state,\textsuperscript{20} sex discrimination\textsuperscript{21}—its most widespread resurrection has occurred in the realm of criminal procedure. This Article will therefore summarize the important criminal procedure cases decided to date in order that they may be digested and understood by lawyers, judges, and law students alike.

Before launching into the criminal cases, however, it is important to introduce the basic tools of state constitutional decision making. These are necessary if the current cases are to be used as a template for further change. Two pivotal issues—relating to the “supremacy clause” and the “adequate and independent state grounds” doctrine—must be understood before lawyers, judges, and students of the law will be able to apply their own state constitutions to the area of criminal procedure, and develop new case law for the 21st century.

\textbf{B. The Supremacy Clause Issue}

\textit{It is often} presumed that the supremacy clause of the U.S. Constitution poses a barrier to states interpreting the criminal procedural provisions of their own constitutions in ways which directly contradict the holdings of the U.S. Supreme Court. The answer to this common misconception is: Not really. From the earliest period of

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Survey of State Constitutional Individual Rights Decisions, 55 U. Cin. L. Rev. 317, 322-23 (1986). Moreover, so long as the state court firmly grounds expanded liberties in its own constitution, the United States Supreme Court will not review its decisions. As Justice O'Conner recently explained: “If the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, we . . . will not undertake to review the decision.” Michigan v. Long, 463 U.S. 104, 1040-41 (1983). However, after Michigan v. Long, judges wishing to carve out new law under state constitutions must explicitly state that they are basing their decision on the state constitution rather than the U.S. Constitution. Id.
\end{quote}


this country's history, it has been recognized that the states were meant to retain their own insulated pockets of authority, particularly in the criminal realm. Alexander Hamilton, lobbying for ratification of the U.S. Constitution in the Federalist Papers, over two hundred years ago, made clear that the supremacy clause was not meant to vest omnipotence with the federal government at the expense of the states' autonomy:

If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. . . . But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.22

Support for state supplementation of federal policy inheres in the text of the supremacy clause itself. The clause directs that a state court obey federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."23 When a state law supplements some federal provision, it is not "contrary" to the federal provision, and execution of the federal law can occur "notwithstanding" state law. Thus, the supremacy clause has evolved such that federal law will preempt state law only where the courts find that Congress has expressly intended to preempt, or where Congress has not shown an express intent but federal law actually conflicts with state law.24

In regards to state constitutional law, this essentially means that states are free to provide protections with respect to individuals' rights under their own constitutions. The supremacy clause sets a minimum standard below which states cannot go in protecting fundamental freedoms. However, states are free to go beyond that minimum.

This precept of state constitutional law has been stated in many different ways by many different scholars. Justice Pollock of the

23 U.S. Const. art. VI.
New Jersey Supreme Court recently wrote: “The first ten amendments [to the U.S. Constitution] establish a foundation for the protection of human liberty. A state may not undermine that foundation, but its constitution may build additional protections above the federal floor.”25 Others have stated it in similar terms: “It is an article of faith of the ‘new federalism’ that under state constitutions judges can give ‘more’ protection to rights claimants than what has been allowed by the U.S. Supreme Court in interpreting the U.S. Bill of Rights.”26

In the area of criminal procedure, as highlighted by the cases that follow, this test works in a straightforward fashion. The polestar is the individual. States may grant more rights to the individual, or parallel the rights granted by the U.S. Supreme Court. But they may never grant fewer rights. Outside of the criminal context, however, this simplistic test becomes more oblique. Particularly in areas such as freedom of speech27 and separation of church and state,28 one individual’s “expansion” of rights may be the other individual’s “diminution” of rights, and so the test becomes less valid. Nonetheless, understanding that states are generally free to go beyond the minimum floor established by the U.S. Constitution in turn allows an understanding that the supremacy clause does not pose a barrier where judges and lawyers seek to use state constitutions to create their own criminal procedural standards, so long as they do not slip below the federal minimums.

C. Conquering the “Adequate and Independent State Grounds” Doctrine

The freedom of states to strike out on their own, in interpreting their own constitutions, is not an unbounded power. In criminal law, as in civil law, there are procedural hazards which may thwart the attempt to create new law under state constitutions. The most

important restraint upon lawyers and judges who may seek to use their state constitutions to "diverge" from the settled wisdom of the United States Supreme Court is the "adequate and independent state grounds" doctrine.

Boiled down to its simplest form, the adequate and independent state grounds doctrine simply dictates "when and how" the United States Supreme Court can review decisions of the highest state courts. Within the context of state constitutional law, particularly the controversial subcategory of criminal procedure, this becomes critical. The power to review decisions is ultimately the power to overturn those decisions. Only certain pronouncements by the state courts under their own constitutions will be "shielded" from federal review, thus allowing them to exist in separate pockets without the intrusion of the U.S. Supreme Court. State constitutional cases which diverge significantly from the U.S. Supreme Court dogma may become useless if the U.S. Supreme Court retains the power to overturn those decisions with which it disagrees. Thus, the adequate and independent state grounds doctrine is a necessary, but tricky, starting point for any lawyer or judge seeking to make headway under the unique criminal procedural provision of his or her own state.

In Murdock v. City of Memphis, 29 a case decided in 1874, the U.S. Supreme Court first held that it would not review a decision of the highest state court where that decision was based on "adequate and independent state grounds." In using the term "adequate," the court simply meant that the decision had to stand on its own four legs—the state ground standing by itself had to be sufficient to sustain the decision. By using the term "independent," the court meant that the state ground in question had to possess a life of its own, independent of federal law.

Although the Murdock decision itself makes for difficult reading, the principles behind it are sensible ones. There are at least three reasons, in retrospect, that justify the creation of the adequate and independent state grounds doctrine: judicial economy, 30 comity, 31

29 87 U.S. (20 Wall.) 590 (1874).
30 Judicial economy simply dictates that it is an imprudent use of the U.S. Supreme Court's precious resources to review decisions of the highest state courts which ultimately stand on their own merits, based upon state law, apart from any reference to federal precedent.
31 Comity, in this setting, means that it is in the best interest of good manners for the U.S. Supreme Court to extend a measure of autonomy to state judges when it comes to interpreting their own state law and defining state policy.
and jurisdiction. The most important of these, without question, is jurisdiction. Article III, section 2 of the U.S. Constitution forbids the issuance of advisory opinions. This means if a state court decision rests on some adequate, independent state ground, any reexamination of the case based upon federal precedent is purely academic—it amounts to the rendering of a legal opinion which should not, and can not, alter the outcome of the case. As such, the U.S. Supreme Court is, in a strict constitutional sense, without jurisdiction to take such a case. The adequate and independent state grounds doctrine thus serves the paramount purpose of ensuring that the U.S. Supreme Court does not overstep its own sensitive bounds of jurisdiction.

For the first fifty years after Murdock v. City of Memphis was handed down, the adequate and independent state grounds doctrine amounted to an expression of "laissez faire" with respect to state court decisions. The Supreme Court extended as much deference as possible to the states. Where the highest state courts issued opinions which jumbled together citations to federal and state law, the U.S. Supreme Court essentially presumed they rested upon some adequate, independent state ground, and declined to interfere. For instance, in Lynch v. New York,\(^\text{12}\) decided in 1934, Chief Justice Hughes made clear the Supreme Court's reluctance to review such decisions of the state courts:

Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.\(^\text{13}\)

As the general deference towards state courts and their autonomy wavered in the middle of the 20th century, however, the adequate and independent state grounds doctrine budged towards the center. During the 1940s and 1950s, the U.S. Supreme Court began vacating and remanding decisions of state courts wherever ambiguous, asking the state court to clarify whether it was relying on federal law, state law, or both. If the state court indicated it had relied on federal precedent as a necessary element in reaching its decision, the case was then reviewable by the Supreme Court.\(^\text{14}\)

\(^{12}\) 293 U.S. 52 (1934)

\(^{13}\) Id. at 54-55.

\(^{14}\) In Minnesota v. National Tea Co., 309 U.S. 551 (1940), the Minnesota Supreme Court had issued an opinion striking down a controversial chain store tax, which allowed chain stores to be taxed at progressive rates, imposing higher taxes on stores with
It was only recently, with the onslaught of state constitutional decision making that presented itself in the 1970s and 1980s, that the U.S. Supreme Court switched the presumption against the states. In *Michigan v. Long*, the Court was faced with a criminal decision handed down by the Supreme Court of Michigan, which made reference to both the fourth amendment of the U.S. Constitution and article I, section 11 of the Michigan Constitution, in invalidating the warrantless search of the passenger compartment of an automobile. The Supreme Court diverged from its prior holdings related to the adequate and independent state grounds doctrine, essentially presuming that a mixed reference to federal and state precedent indicated that an adequate and independent state ground did not exist. Thus, the U.S. Supreme Court was permitted to review the case and ultimately reversed the Michigan Supreme Court.

Justice O'Connor, who authored the majority opinion in *Michigan v. Long*, wrote:

> [W]hen, as in this case, 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

higher sales. The Minnesota Supreme Court struck down the statute, and in doing so made reference to both the equal protection clause of the U.S. Constitution, and article 10, § 1 of the Minnesota Constitution ("Taxes shall be uniform upon the same class of subjects..."). The U.S. Supreme Court—departing from its prior track record of presuming the decision had rested on adequate and independent state grounds—vacated and remanded the case in order that the Minnesota Supreme Court could resolve the "obsccurities and ambiguities," and make clear whether it was relying on state law, federal law, or both.

Similarly, in *Herz v. Pitsenbarger*, 324 U.S. 117 (1945), the Illinois Supreme Court dismissed the claim of a railroad switchman, pointing to both federal and state procedural precedent. The U.S. Supreme Court continued the case (i.e., held it in abeyance) and ordered counsel for petitioners to apply to the Illinois Supreme Court for certification showing whether the judgment rested on state or federal grounds.

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36 *Michigan v. Long* involved a decision of the Michigan Supreme Court, which had attempted to curb the *Terry v. Ohio* doctrine by forbidding the warrantless search of the passenger compartment of an automobile during a lawful investigatory stop. The Michigan Supreme Court made fleeting reference to both the U.S. and Michigan Constitutions, and concluded simply: "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. I, § 11 of the Michigan Constitution." *People v. Long*, 413 Mich. 460, 472-73, 320 N.W.2d 866, 870 (1982). The U.S. Supreme Court departed from its past presumption of laissez faire towards the states and held that this mixed reference to federal and state law permitted the federal courts to step in and overturn the decision. *Michigan v. Long*, 463 U.S. at 1034-44.
law required it to do so. If a state court chooses merely to rely on federal precedents as it would in 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.37

Michigan v. Long is therefore both a blessing and curse for would-be state constitutional lawyers and judges. It is a curse because it has flipped the adequate and independent state grounds doctrine on its head, allowing the U.S. Supreme Court to review the decisions of the state courts (and overturn those decisions) where the state court has made mixed references to federal and state precedent. It is a blessing, however, because it prods lawyers and judges to be more explicit. The clear message of Michigan v. Long is that if lawyers and judges wish to carve out new law under state constitutions, they must take a deep breath and dive in headfirst.

II
Criminal Law and Procedure: A Guide to the Case Law

A number of attempts have been made to collate the cases which have emerged in the area of criminal procedure, under state constitutions. The most significant example of such an effort appeared in the Harvard Law Review in 1982,38 and more recently in an article authored by Justice Shirley Abrahamson of the Wisconsin Supreme Court, which appeared in the Texas Law Review in 1985.39

The following synopsis of the criminal cases was largely produced by students at the University of Pittsburgh School of Law during the course of a seminar in state constitutional law conducted in 1985 and 1986 and further edited in later years. This detailed summary of the leading cases is designed to solidify a sprawling new area of the law, and thus serve as a primer for future change.

A. Body Search

In United States v. Robinson,40 the United States Supreme Court first defined the scope of a search incident to an arrest for a minor.

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38 See Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982).
traffic violation. The Court held that a full search of the person incident to a custodial arrest was per se reasonable.\textsuperscript{41} In the companion case of \textit{Gustafson v. Florida},\textsuperscript{42} the Court reiterated that a full search of a person subsequent to a lawful custodial arrest violated neither the fourth amendment nor the fourteenth amendment.\textsuperscript{43} Moreover, it was of no constitutional significance that the arresting officer was not required by department regulations to take the arrestee into custody.\textsuperscript{44} It was also constitutionally irrelevant that the arresting officer was not in subjective fear of the defendant and had no suspicion that the defendant might be armed.\textsuperscript{45}

The California Supreme Court, in an early reaction to the Robinson-Gustafson holdings, relied upon its own constitution to define the permissible scope of a search incident to a minor offense. \textit{People v. Brisendine}\textsuperscript{46} held that a search of a person incident to a custodial arrest for a municipal ordinance violation could be upheld only where specific facts or circumstances alerted the arresting officer that a suspect might be armed and dangerous. Moreover, the California court limited the scope of the search to a pat-down reasonably likely to discover weapons.\textsuperscript{47} The California Supreme Court relied upon article I, section 13 of the California Constitution, which the court held imposed a higher standard on searches than the Robinson-Gustafson holdings.\textsuperscript{48}

Recently, however, the California Supreme Court has retreated from its assertive use of state constitutional law in this area. As a result of Proposition 8,\textsuperscript{49} the California Constitution now provides a

\begin{enumerate}
\item Id. at 235.
\item 411 U.S. 260 (1971).
\item \textit{Gustafson} involved a custodial arrest for a traffic violation. The subsequent search revealed marijuana cigarettes contained in a cigarette box in the defendant's jacket. \textit{Id.} at 252.
\item Id. at 265: cf. United States v. Robinson, 414 U.S. at 221 n.2, where department procedures mandated a body search whenever a full custodial arrest was made.
\item Id. at 232-33; 414 U.S. at 266.
\item 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). In Brisendine, four youths were arrested for violation of a county ordinance prohibiting open campfires in the San Bernardino National Forest. The youths were escorted out of the forest because the sheriff's had left their citizens books in the car. Prior to escorting the youths to the patrol car, the sheriffs conducted a search of a knapsack belonging to the defendant and found a frosted opaque bottle. Upon opening the bottle, the sheriffs discovered marijuana inside. \textit{Id.} at 533-34, 531 P.2d at 1101-02, 119 Cal. Rptr. at 317-18.
\item Id. at 544-45, 531 P.2d at 1109, 119 Cal. Rptr. at 325.
\item Id. at 546, 531 P.2d at 1110, 119 Cal. Rptr. at 326.
\item Proposition 8 was formally enacted as article I, \$ 28(d) of the California Constitution. It states: "Except as provided by statute hereafter enacted... relevant evidence shall not be excluded in any criminal proceeding..." \textit{CAL. CONST.} art. I, \$ 28(d).\end{enumerate}
judicial remedy for violations of the search and seizure provisions of either the federal or state constitutions. Thus, the exclusionary rule may be applied only when exclusion of evidence is federally compelled. Consequently, California, as a result of voter referendum, has in effect adopted the Robinson-Gustafson holdings by default, demonstrating that state constitutional protections may be less durable than federal guarantees, at least in states where the constitution may be easily amended by the legislature and voters.

In the years following the Robinson-Gustafson decisions, at least three other states have criticized the restrictive federal standard. In State v. Caraher, the Supreme Court of Oregon concluded that a valid custodial arrest alone did not justify a search incident to an

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51 This is particularly true where the voters or legislature disapprove and where amendment to the state constitution can be accomplished relatively quickly, which is generally the case, in contrast to amendments under the U.S. Constitution.

In State v. Kaluna, the Supreme Court of Hawaii followed the reasoning of Brisendine. Relying on the Hawaii Constitution, the court held that searches incident to arrest must be justified by the circumstances surrounding the arrest; the fact that a valid arrest has been made, without more, is not enough. State v. Kaluna, 55 Haw. at 372, 520 P.2d at 60. Furthermore, even where the circumstances demonstrate a legitimate basis for conducting a search, such a search is lawful only if it is no broader than required by specific identified circumstances. In a footnote, the Kaluna court criticized the Robinson-Gustafson holdings:

In [Robinson and Gustafson] ... the lawful custodial arrest alone gave the police authority to violate whatever privacy interest ... the arrestees may have had. Indeed, by thus severing the connection between the authority to search and any reason to search other than the fact of lawful custody, Robinson and Gustafson have seemingly sanctioned minuscule scrutiny by the police into any and all items an arrestee in custody may happen to have in his possession.

Id. at 369 n.5, 520 P.2d at 58 n.5.

The Alaska Supreme Court rejected the Robertson-Gustafson holdings under its state constitution as inapplicable both to searches incident to arrest, see Zehrung v. State, 569 P.2d at 199-200, and preincarceration inventory searches of arrestees, see Reeves v. State, 599 P.2d 727, 735-36 (Alaska 1979). The court rejected the implicit holding in the Robinson-Gustafson cases that a person subjected to a lawful custodial arrest has no significant fourth amendment interest in the privacy of his or her person. In upholding the rights of the individual against routine searches, the court held that warrantless searches must not be "broader or more intrusive than necessary" to carry out the governmental purpose justifying the search. Id. at 735.
53 293 Or. 741, 653 P.2d 942 (1982).
arrest.\textsuperscript{54} The \textit{Caraher} decision was particularly noteworthy because the Oregon court had followed \textit{Robinson} several years earlier.\textsuperscript{55} In relying upon its own constitution to provide additional protection to its citizens, the court cited the problems that often result from the \textit{Robinson} analysis:

We find that the focus on the character of the property searched has led to results which seem too frequently to turn upon fortuitous circumstances surrounding how one chooses to transport personal belongings and has resulted in failure of a more straightforward assessment of those individual protections against government intrusion which constitutions, both state and federal, seek to preserve.\textsuperscript{56}

In a somewhat different twist, the Colorado Supreme Court declined to expand the permissible scope of searches incident to arrests by relying on its own \textit{pre-Robinson} case law. In \textit{People v. Clyne},\textsuperscript{57} the Colorado court adhered to its previous rulings that searches conducted incident to noncustodial arrests for minor traffic or municipal code violations were limited to pat-down searches, and then only where circumstances justified a belief that the violator was armed and dangerous.\textsuperscript{58} While noting that \textit{Robinson} permitted a full search incident to any lawful custodial arrest, the court held that \textit{Robinson} and \textit{Gustafson} did not affect its prior holdings requiring the court to examine the circumstances of each arrest in deciding whether or not a search was justified.\textsuperscript{59} Thus, the Colorado case demonstrates that a state court can avoid unacceptable diminutions in the rights of its citizens, by merging a prior U.S. Supreme Court standard with its own state constitutional jurisprudence, thus avoiding federal change which is not acceptable.

\subsection*{B. The “Automobile Exception”}

The first United States Supreme Court case to recognize an auto-

\textsuperscript{54} See id. at 756-57, 653 P.2d at 950-51. “Such a warrantless search must be justified by the circumstances surrounding the arrest.” \textit{Id.} at 757, 655 P.2d at 951.


\textsuperscript{56} State v. Caraher, 293 Or. at 756, 653 P.2d at 950. In State v. Owens, 302 Or. 196, 202, 729 P.2d 524, 527-28 (1986), the court limited the meticulous investigation of closed containers found on an arrestee to situations where the arresting officer reasonably believes that the container could conceal evidence of the crime. The court also noted that a pat-down search for the protection of the police officer is justified whenever a custodial arrest is made. Id. at 200, 729 P.2d at 527.

\textsuperscript{57} 189 Colo. 412, 541 P.2d 71 (1975), \textit{limited by} People v. Bischoferger, 724 P.2d 660 (Colo. 1986).

\textsuperscript{58} See People v. Clyne. 189 Colo. at 413-14, 541 P.2d at 72.

\textsuperscript{59} \textit{Id.}
mobile exception to the fourth amendment search warrant requirement was Carroll v. United States. In Carroll, the Court differentiated between searches of buildings, which were not readily moveable, and searches of vehicles, which might be moved before a search warrant could be obtained. In approving the warrantless search of an automobile, the Court observed that officers must obtain a warrant prior to a search whenever it is practical to do so. However, if "exigent circumstances" made it impractical to obtain a warrant, a warrantless search would be tolerated, provided that the officers had probable cause to believe the vehicle searched was illegally transporting contraband.

Courts following Carroll at first applied the automobile exception only to warrantless automobile searches preceding arrests. However, in Chambers v. Maroney, the Court extended the Carroll rule to encompass warrantless searches of automobiles conducted after the occupant had been arrested and the vehicle secured.

The Supreme Court further expanded the scope of a warrantless automobile search in United States v. Ross. Ross held that

the scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justi-

81 Id. at 133.
82 Id. at 155-56.
83 See, e.g., Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931). Since the arrestees could not move the vehicles, the Court saw no practical difficulty in obtaining a warrant prior to a search of the vehicle.
85 Id. at 52. The automobile exception was originally part of a class of exceptions to the warrant requirement based on exigency. Exigencies included searches incident to arrest, hot pursuit, emergencies, and the prevention of the loss or destruction of evidence. The rationale for allowing police to search and seize without having a neutral magistrate review their probable cause determination is that obtaining a warrant is impossible or impracticable under the circumstances, and the societal need for quick action on the part of the police outweighs the privacy rights of the individual whose person or property is searched.

In recent years, the Court has retreated from its treatment of the automobile exception as a member of the exigency class. In California v. Carney, 471 U.S. 386, 391-92 (1985), the Court adopted an additional justification for the automobile exception originally proposed some years earlier. See Cardwell v. Lewis, 417 U.S. 383 (1974). In Cardwell, a plurality of the Court applied the reasonable "expectation of privacy" analysis to automobiles, see Katz v. United States, 389 U.S. 347 (1967), noting that individuals have less expectation of privacy in their automobiles than in their residences. Cardwell v. Lewis, 417 U.S. at 590-91. Thus, the automobile exception now has vitality independent from the exigent circumstances analysis.

fies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.\(^\text{67}\)

After Ross, only two limits remain on the scope of a vehicle search under the automobile exception. First, there must be probable cause to search the vehicle. Second, the search can extend only to areas that might conceal the items sought.\(^\text{68}\) Notwithstanding these restrictions, officers may now examine the contents of any container in the vehicle that might hold the item sought, regardless of whether the container is locked or not, and regardless of its location in the vehicle.\(^\text{69}\)

Several state courts, relying on their own constitutions, have extended the protections against unreasonable searches and seizures beyond the narrow confines of Ross. For example, in State v. Benoit,\(^\text{70}\) the Supreme Court of Rhode Island, while recognizing that the fourth amendment and its Rhode Island counterpart are virtually identical, nevertheless held that under the Rhode Island Constitution all warrantless searches and seizures made in the absence of exigent circumstances are unreasonable.\(^\text{71}\) Because a seized vehicle is no longer mobile, an individual’s expectation of privacy in that vehicle rises to the same level as in the case of any other container.\(^\text{72}\)

Consequently, unless exigent circumstances demand an immediate search, the Rhode Island Constitution does not permit a warrantless search.\(^\text{73}\)

In State v. Ringer,\(^\text{74}\) the Supreme Court of Washington refused to legitimate a search of defendant’s van that was otherwise permissible under the Ross analysis. While Ross permitted a warrantless search of a vehicle based upon probable cause, the Washington Constitution permits warrantless searches only when an emergency or exigent circumstance exists.\(^\text{75}\)

In applying a totality of the circumstances analysis to the situation in Ringer, the court concluded that, although the arresting officers had probable cause to search the defendant’s vehicle, the state failed to demonstrate any exigent circumstances justifying the officers’ failure to obtain a warrant

\(^{67}\) Id. at 825.

\(^{68}\) Id.

\(^{69}\) Id. at 520-21 & nn.27-28.

\(^{70}\) 417 A.2d 895 (R.I. 1980).

\(^{71}\) Id. at 901.

\(^{72}\) Id. at 900-01 n.1.

\(^{73}\) Id. at 901.

\(^{74}\) 100 Wash. 2d 686, 674 P.2d 1240 (1984).

\(^{75}\) Id. at 701, 674 P.2d at 1248.
prior to the search.\textsuperscript{76} Therefore, the search violated the Washington Constitution.\textsuperscript{77}

California again looked to its state constitution to extend fourth amendment protections in \textit{People v. Ruggles}.\textsuperscript{78} \textit{Ruggles} held that a postarrest warrantless search of a briefcase found in the trunk of the defendant’s automobile, even though based upon probable cause, violated the California Constitution. While expressing some doubt whether \textit{Ross} would control fourth amendment analysis under the peculiar facts in \textit{Ruggles},\textsuperscript{79} the court based its decision on the "more exacting standard" of article I, section 13 of the California Constitution.\textsuperscript{80} Under the California Constitution, the court held, probable cause alone cannot justify a warrantless search of a briefcase or other similar luggage. Unless the owner consents or exigent circumstances require an immediate search, a warrant must be obtained prior to any lawful search of such a container.\textsuperscript{81}

In \textit{State v. Camargo},\textsuperscript{82} the New Hampshire Supreme Court invalidated a warrantless seizure of a parked vehicle and a subsequent warrantless search of the vehicle.\textsuperscript{83} The court implicitly rejected \textit{Ross}, noting that under the New Hampshire Constitution, a warrantless search was justified only when both probable cause and exi-

\textsuperscript{76} \textit{Id.} at 703, 674 P.2d at 1249-50.

\textsuperscript{77} Recently, the Washington Supreme Court abandoned this totality of the circumstances analysis. Citing the problem that such an analysis causes police officers to make instantaneous decisions, the court adopted a "bright line" rule. Thus, \textit{State v. Stroud}, 106 Wash. 2d 144, 720 P.2d 816 (1986), allowed a warrantless search of the passenger compartment of a vehicle immediately subsequent to the arrest of the occupant, even without exigent circumstances. \textit{See id.} at 151, 720 P.2d at 440. However, the search must not invade any locked containers, including a locked glove compartment, located inside the passenger compartment. The court reasoned that a locked container benefited from the increased privacy protection provided by the Washington Constitution. Moreover, the suspect could not destroy evidence contained in a locked container. \textit{Id.} at 152, 720 P.2d at 441.

\textsuperscript{78} 39 Cal. 3d 1, 702 P.2d 170, 216 Cal. Rptr. 88 (1985).

\textsuperscript{79} \textit{Id.} at 11, 702 P.2d at 176, 216 Cal. Rptr. at 94. The court noted that the police officers knew that the briefcase was likely to contain a weapon; therefore the automobile exception, as expanded in \textit{Ross}, might not be applicable. \textit{Id.}

\textsuperscript{80} \textit{Id.} This was the same provision that provided the basis for the California Supreme Court’s decision in \textit{People v. Brisendine}. \textit{See supra} notes 46-49 and accompanying text. While proposition 8 overruled \textit{Brisendine}, the alleged illegal conduct in \textit{Ruggles} occurred prior to the enactment of Proposition 8 and thus was unaffected by its enactment. \textit{People v. Ruggles}, 39 Cal. 3d at 12 n.4, 702 P.2d at 176 n.4, 216 Cal. Rptr. at 94 n.4.

\textsuperscript{81} \textit{People v. Ruggles}, 39 Cal. 3d at 12-13, 702 P.2d at 177, 216 Cal. Rptr. at 95.

\textsuperscript{82} 126 N.H. 766, 498 A.2d 292 (1985).

\textsuperscript{83} \textit{Id.} at 771, 498 A.2d at 296.
gent circumstances exist. In *Camargo*, the warrantless search was invalidated on the grounds that while probable cause for the search existed, exigent circumstances did not. Therefore, despite the *Ross* holding that probable cause alone would justify a search of the entire vehicle, the *Camargo* court looked to the New Hampshire Constitution to provide greater protection from unreasonable searches.

In each of these cases, state courts responded quickly and effectively to negate the constricting effects of cases decided by the U.S. Supreme Court under the fourth amendment. Although the purpose of *Ross* was to create a simple "bright line" rule for police officers to follow, a few states swiftly decided that the need for certainty was outweighed by the need for privacy in one's possessions, under their own constitutions.

C. Automobile Inventory Searches

For over fifty years the U.S. Constitution was interpreted to permit warrantless automobile searches only where "exigent circumstances" required immediate action. Then, in *South Dakota v. Opperman*, the Supreme Court upheld a warrantless inventory search of an impounded motor vehicle, creating a second major category of permissible warrantless vehicle searches. The Court observed that inventory searches of impounded vehicles responded to three needs: 1) the protection of the vehicle owner's property; 2) the protection of the police against claims or disputes over allegedly stolen property; and 3) the protection of the police from potential danger. Taken together, these considerations negate claims that an inventory search of an impounded vehicle, conducted according to standard police procedures, might amount to an unreasonable search within the meaning of the fourth amendment.

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84 *Id.* at 770, 498 A.2d at 295.
85 "[T]he exigency exception was not met because the automobile was parked and was therefore not mobile . . . ." *Id.* at 771, 498 A.2d at 296 (citation omitted).
86 *Id.*, see also *State v. McGann*, 124 N.H. 101, 467 A.2d 571 (1983), an earlier case where the New Hampshire Supreme Court invalidated a warrantless search of a vehicle parked on private property, stating that under such circumstances the proper standard for a warrantless search is probable cause plus exigent circumstances. *Id.* at 108, 467 A.2d at 574.
88 *Id.* at 369.
89 *Id.* at 376. The Court noted that there was no suggestion that the inventory search conducted in *Opperman* was a pretext concealing an investigatory motive for the search. *Id.* *But cf.* *State v. Hygh*, 711 P.2d 264, 270 (Utah 1985), in which the Utah Supreme
However, several states have held that the Supreme Court's decision in *Opperman* is overly intrusive upon the privacy interests of individuals. In fact, upon remand from the U.S. Supreme Court in *Opperman* itself, the South Dakota Supreme Court refused to follow the federal decision.\(^{90}\) The court rejected the argument that the similarity between the language in the South Dakota Constitution and the fourth amendment required it to adhere to the *Opperman* analysis. Instead, the South Dakota court concluded that logic and sound regard for protection against unreasonable searches and seizures "warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment."\(^{91}\) For a warrantless inventory search to be reasonable, the South Dakota court ruled, it must result in only "minimal interference" with an individual's protected rights.\(^{92}\) This "minimal interference" restriction thus limits inventory searches to safeguarding only those items in the vehicle in the plain view of the police officer.\(^{93}\)

The Supreme Court of Montana likewise adopted the South Dakota view that only articles in plain view are subject to inventory searches.\(^{94}\) The court noted that South Dakota's plain view restriction "reasonably balance[d] the needs of the police as custodians of a lawfully impounded vehicle with the rights of privacy and freedom from unreasonable searches and seizures held by individuals in Montana."\(^{95}\) Thus, relying upon its state constitution, Montana also limited the scope of inventory searches to items in plain view of the police officer.

Similarly, in *State v. Daniel*,\(^{96}\) the Supreme Court of Alaska held that a warrantless inventory search of closed, locked, or sealed containers found in a vehicle constituted an unreasonable search under the Alaska Constitution.\(^{97}\) Unlike *Opperman* and *Ross*, the Alaska Constitution did not distinguish between an individual's expectation

\(^{90}\) See *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976).

\(^{91}\) Id. at 675.

\(^{92}\) Id.

\(^{93}\) Id.


\(^{95}\) Id. at 518, 571 P.2d at 1134.

\(^{96}\) 589 P.2d 408 (Alaska 1979).

\(^{97}\) Id. at 417-18. The language of article I, § 14 of the Alaska Constitution (prohibiting unreasonable searches and seizures) is similar to the fourth amendment. See *State v. Daniel*, 389 P.2d at 411 n.9.
of privacy in closed containers found in homes and closed containers found in automobiles. Therefore, police would be required to obtain a warrant to search the contents of closed containers recovered in an inventory search, before such containers would be admissible under the Alaska Constitution.

West Virginia looked to its state constitution as a basis for departing from Opperman in State v. Geff. Initially, the court determined that the result in Opperman depended on four circumstances: 1) the vehicle must be lawfully impounded; 2) the driver must be unavailable to make alternate arrangements for the safekeeping of his or her property; 3) the inventory search must be prompted by a plain-view sighting of valuables inside the car; and 4) there must be no suggestion that the inventory search was a pretext for an investigative search. Based upon this analysis, the court refused to authorize the routine inventory search of the defendant's impounded vehicle. However, even if Opperman did not turn on these factors, the West Virginia court adopted them as prerequisites for a permissible inventory search under the West Virginia Constitution.

The Montana and South Dakota cases discussed above highlight a recurring theme in state constitutional jurisprudence. Not only do states serve as "laboratories" for the federal system, as Justice Brandeis once observed, but it is common for states to place a large amount of precedential value on state constitutional decisions from other states, thus allowing successful experiments to transfer quickly from one state to another.

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98 "[W]e embrace the observation that: 'The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears.' State v. Daniel, 585 P.2d at 416 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971)).

99 Id. at 416.

100 272 S.E.2d 457 (W. Va. 1980).

101 Id. at 459-60.

102 Id. at 460. In a more recent case, the West Virginia court ruled that the owner of an automobile who is arrested in or near his or her vehicle must ordinarily be given a reasonable opportunity to make some alternative disposition of the vehicle before the police may impound it for the purpose of protecting the vehicle and its contents from theft or damage. State v. Perry, 324 S.E.2d 354, 359 (W. Va. 1984). Relying on article III, § 8 of the West Virginia Constitution, the court invalidated an inventory search of a vehicle on the grounds that the arrested owner of the vehicle was not given the opportunity to arrange for some alternative disposition of the vehicle prior to its impoundment. Id. at 360. The court noted that impoundment and a subsequent inventory search would be proper only if the owner of the vehicle is unavailable or incapable of making arrangements for the vehicle's protection, or if the vehicle must be retained as evidence of the crime. Id. at 359.
D. Vehicle Search Incident to Arrest

Federal courts now recognize a second automobile-related exception to the fourth amendment’s warrant requirement. This extension of the search incident to arrest rule permits officers arresting an occupant of a vehicle to search the entire vehicle without obtaining a warrant. Several states have responded to this situation by finding enhanced protections in their state constitutions.

Until recently, the scope of a permissible search incident to an arrest was defined by Chimel v. California.\(^{103}\) In Chimel, the Supreme Court limited the scope of a permissible search to the person of the arrestee and the area under the arrestee’s immediate control.\(^{104}\) The Court focused on the arrestee’s access to the area searched and the need to prevent the arrestee from procuring a weapon or destroying evidence.\(^{105}\)

In subsequent years, the difficulties created by this case-by-case analysis prompted the Supreme Court to adopt a new “bright line” rule for the scope of permissible vehicle searches conducted subsequent to arrest. New York v. Belton\(^{106}\) held that officers may search the entire passenger compartment of a vehicle, including the contents of any closed containers, when making a lawful custodial arrest of the vehicle’s occupant.\(^{107}\) The Court reasoned that containers in the passenger compartment are properly subject to a search because the arrest of an individual justifies the infringement of any privacy interest the arrestee might have in the container’s contents.\(^{108}\)

This expansion of the scope of permissible vehicle searches incident to the occupant’s arrest prompted several states to employ state constitutional principles to maintain the pre-Belton limits on the scope of such a search.

The New York Court of Appeals rejected the Supreme Court’s analysis in Belton when it decided the case on remand.\(^{109}\) The court feared that any expansion of searches conducted incident to an

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\(^{103}\) 395 U.S. 752 (1969).

\(^{104}\) Id. at 763.

\(^{105}\) Id. Although Chimel was apprehended in a residence, the “immediate control” test also applies to a search of a vehicle incident to an arrest.


\(^{107}\) Id. at 460. The Court noted in a footnote that its ruling in Belton only involved the interior of the passenger compartment of the vehicle and did not extend to the trunk of a vehicle. Id. at 460-61 n.4.

\(^{108}\) Id. at 460-61.

arrest might destroy all distinct spatial limitations on the scope of such a search.\textsuperscript{110} As a result of these concerns, the New York court chose to analyze \textit{Belton} under the automobile exception. In affirming Belton's conviction, the court held that under the New York Constitution, a valid arrest of an occupant of a vehicle justifies a warrantless search of the vehicle's passenger compartment and containers therein only when the police have reason to believe that the car contains evidence related to the crime prompting the arrest, or when a weapon might be discovered, or a means of escape prevented. Because these circumstances did not exist, the evidence uncovered in the search was properly admitted.\textsuperscript{111}

Louisiana was the second state to depart from the federal \textit{Belton} rule. In \textit{State v. Hernandez},\textsuperscript{112} the police arrested the defendant and then searched his car without first obtaining a warrant.\textsuperscript{113} Initially, the court distinguished \textit{Belton} on the grounds that the search in \textit{Hernandez} was not a search incident to arrest. More importantly, however, the court expressly rejected the \textit{Belton} rule as violative of the Louisiana Constitution.\textsuperscript{114} The state constitution, the


\textsuperscript{111} People v. Belton, 55 N.Y.2d at 55, 432 N.E.2d at 748, 447 N.Y.S.2d at 876.

\textsuperscript{112} People v. Belton, 55 N.Y.2d at 55, 432 N.E.2d at 748, 447 N.Y.S.2d at 876.

\textsuperscript{113} Since the police officer in \textit{Belton} smelled marijuana in the car and observed on the car boot a type of envelope frequently used in marijuana sales, his search of the defendant's jacket on the backseat of the car was proper. Therefore, the cocaine found in the jacket was properly admitted. \textit{Id.}; see also \textit{State v. Gokey}, 60 N.Y.2d 109, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983).

The New York Court of Appeals declined to apply the expanded federal parameters of a search incident to arrest in cases not involving vehicles. In \textit{State v. Gokey}, the court held that because exigent circumstances did not justify the search of a duffel bag in the possession of the defendant, a warrantless search of the bag incident to arrest violated the New York Constitution. "Under the State Constitution, an individual's right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances." \textit{Id.} at 312, 457 N.E.2d at 724, 469 N.Y.S.2d at 619. In reaching this result, the court again rejected Belton's conclusion that a custodial arrest always provides sufficient justification for a warrantless search of any container within the "immediate control" of the arrestee. \textit{Id.} Since the defendant was handcuffed and surrounded by police officers prior to the search, neither safety concerns nor the preservation of evidence justified the warrantless search of the duffel bag. \textit{Id.} at 313-14, 457 N.E.2d at 725, 469 N.Y.S.2d at 620.

\textsuperscript{114} "Although the Belton case is distinguishable and therefore inapplicable here, it should be noted that we do not consider it to be a correct rule of police conduct under our state constitution." \textit{Id.} at 1385.
court declared, required officers to obtain warrants to conduct searches incident to arrest unless prompt action was necessary to protect the officer or prevent the destruction of evidence.\textsuperscript{115}

More recently, the Washington Supreme Court rejected the \textit{Belton} rule in \textit{State v. Stroud}.\textsuperscript{116} The court agreed with \textit{Belton}'s premise that police need a clear test to distinguish permissible from impermissible searches. However, because the Washington Constitution protected an individual's right of privacy more extensively than the Federal Constitution,\textsuperscript{117} a warrantless search of the passenger compartment of a car conducted immediately incident to an arrest must not intrude into locked containers or glove compartments. Moreover, the search can be conducted only during the arrest process, which includes the time immediately subsequent to the arrest.\textsuperscript{118} The court determined that these limitations reasonably balanced the need for effective law enforcement with the protection of individual rights provided by the Washington Constitution.\textsuperscript{119}

\textit{E. The Good-Faith Exception to the Exclusionary Rule}

The Supreme Court's recent decision to recognize a "good-faith" exception to the exclusionary rule has ignited further efforts in certain state courts to preserve pre-Burger Court standards. In \textit{United States v. Leon},\textsuperscript{120} the police, after an extensive narcotics investigation, sought and obtained a facially valid search warrant. Upon execution of the warrant, a large quantity of cocaine was discovered. At trial, the district court determined that the affidavit supporting the warrant did not establish probable cause for the search. As a result, the court suppressed the cocaine.\textsuperscript{121}

In reversing the Ninth Circuit's affirmance of the suppression

\begin{itemize}
\item \textsuperscript{115} Id. at 1385. The Louisiana court cited authorities criticizing the \textit{Belton} rule for encouraging pretextual custodial arrests. Id. at 1385 n.2. The court quoted Professor LaFave: "On balance, then, there is good reason to be critical of the [Supreme Court's work in Belton]." Id. (quoting W. LAFAVE, SEARCH AND SEIZURE \textit{\textsuperscript{A}\textsubscript{0} (1982 Supp)).
\item \textsuperscript{116} 106 Wash. 2d 144, 720 P.2d 436 (1986).
\item \textsuperscript{117} Id. at 149-50, 720 P.2d at 439.
\item \textsuperscript{118} Id. The court forced searches and seizures into locked containers or glove compartments for two reasons: first, if it is locked, the individual has indicated a reasonable expectation of privacy; second, the risk of the individual obtaining a weapon from the container decreases because of the increased time factor in opening the container.
\item \textsuperscript{119} Id. at 152-53, 720 P.2d at 441.
\item \textsuperscript{120} 468 U.S. 897 (1984).
\item \textsuperscript{121} Id. at 902-03 (Standing considerations prevented the court from suppressing the entire quantity of illegally seized evidence.)
\end{itemize}
motion, the Supreme Court noted that the exclusionary rule was designed to deter police misconduct, not to punish the errors of judges and magistrates. Excluding evidence seized with a defective warrant, the Court held, would have no deterrent effect on judicial officers or the police officers in the field.\(^{122}\) Therefore, the Court concluded that the marginal benefits obtained by applying the exclusionary rule to evidence seized in reasonable reliance on a subsequently invalidated warrant do not outweigh the substantial costs of excluding probative evidence.\(^{123}\) However, the Court noted it would admit evidence under the "good-faith" exception only if the officer's reliance on the defective warrant was objectively reasonable.\(^{124}\)

Two states have flatly rejected the good-faith exception to the exclusionary rule. In People v. Bigelow,\(^{125}\) the New York Court of Appeals refused to admit evidence seized by officers acting in good-faith reliance on a search warrant later declared invalid. The trial court held that the amphetamines, hypodermic needles, and cash

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\(^{122}\) Id. at 916-17. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them." Id. at 917. Similarly, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Id. at 921 (citation omitted).

\(^{123}\) Id. at 922.

\(^{124}\) Id. at 922-23. Relying on a warrant (1) based on a misleading affidavit, (2) issued by a nonneutral official, or (3) where reliance would not be reasonable does not constitute good-faith reliance. See id.

A recent United States Supreme Court case demonstrates the broad scope of searches now permitted by the "good-faith" exception. In Maryland v. Garrison, 480 U.S. 79 (1987), a search warrant had been issued to police officers to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment." Id. at 80. When the police applied for the warrant and subsequently searched the premises they believed that there was only one apartment on the third floor; however, the third floor actually consisted of two apartments, one belonging to McWebb and the other to the defendant Garrison. While searching the apartment of the defendant Garrison the police recovered quantities of heroin and drug paraphernalia.

The United States Supreme Court rejected the defendant's fourth amendment challenge. The police officers "reasonably believed" they were acting properly in searching the entire floor. Based on this finding, the Court declared that "an officer's reasonable failure to appreciate that a valid warrant describes too broadly the premises to be searched" does not invalidate a search. Id. at 88. Since the warrant authorized a search of the entire third floor, the police officer's failure to recognize that they were in a separate apartment was "objectively understandable and reasonable." Id. Therefore, the searches were valid. Id. Alternatively, even if the search warrant in Garrison authorized only a search of McWebb's apartment, the search was still valid because the officers "reasonably believed" they were in McWebb's apartment. Id.

seized in the search were admissible at trial. On appeal, the appellate division ordered the evidence suppressed because the search warrant lacked probable cause. The New York Court of Appeals affirmed.

The court rejected the state’s contention that the good-faith exception to the exclusionary rule required that the seized evidence be admitted. In stark opposition to the rationale in Leon, the New York Court of Appeals concluded that the good-faith exception undermines the exclusionary rule by encouraging illegal police conduct. Therefore, the court rejected the exception as a matter of state constitutional law.

More recently the New Jersey Supreme Court refused to adopt the good-faith exception in State v. Novembrino. The court reasoned that admitting evidence seized in good-faith reliance on a defective warrant would diminish the quality of evidence presented in search warrant applications. The court stated that by eliminating the need for the trial court to scrutinize the probable-cause justification of a warrant before admitting seized evidence, the good-faith exception encourages police officers to be less meticulous in their warrant applications. Necessarily, then, police officers would be less hesitant to obtain and execute warrants unsupported by adequate probable cause. The court concluded by observing: “[t]he good-faith exception assures us that the constitutional standard will be diluted.”

Thus, because the good-faith exception undermines

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126 Id. at 422, 488 N.E.2d at 454, 497 N.Y.S.2d at 633.
127 Id. at 420, 488 N.E.2d at 453, 497 N.Y.S.2d at 632.
128 Id. at 422, 488 N.E.2d at 455, 497 N.Y.S.2d at 634. In prior cases, the New York Court of Appeals applied the Aguilar-Spinelli test to determine whether information provided by a third party provided sufficient probable cause to support the issuance of a warrant. See Aguilar v. Texas, 378 U.S. 108 (1963); Spinelli v. United States, 393 U.S. 410 (1968). The Aguilar-Spinelli test has been replaced by the “totality of the circumstances” analysis adopted in Illinois v. Gates, 462 U.S. 213 (1983). The Court of Appeals declined to choose either test, holding that the informant’s information in Bigelow was insufficient under both standards. People v. Bigelow, 56 N.Y.2d at 422-23, 488 N.E.2d at 455, 497 N.Y.S.2d at 634.
130 Id. at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637. “[I]f the People are permitted to use the seized evidence, the exclusionary rule’s purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future.” Id.
132 Id. at 152-53, 519 A.2d at 853-54 (quoting 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2, at 20 (Supp. 1986)).
133 Id. at 153, 519 A.2d at 854.
the constitutional requirement of probable cause and limits the judicial remedies used to enforce that right, the New Jersey court refused to recognize a good-faith exception to the exclusionary rule under its state constitution.\textsuperscript{134}

\textbf{F. Electronic Surveillance}

In \textit{United States v. White},\textsuperscript{135} the United States Supreme Court admitted testimony of government agents who used electronic surveillance to monitor incriminating conversations between a defendant and a consenting government informant. Because he could not be located, the informant did not testify at the defendant's trial.\textsuperscript{136} In addressing the defendant's suppression motion, the court observed that police officers have always been permitted to testify about incriminating statements made by a defendant. The fact that a government agent either simultaneously recorded the conversation or transmitted it to other agents should not require a different result.\textsuperscript{137} Utilizing the "reasonable expectation of privacy" test of \textit{Katz v. United States},\textsuperscript{138} the Court in \textit{White} held that since a defendant cannot claim a constitutional violation based upon an expectation of privacy when one party to a conversation reveals the contents of the conversation to the police, a defendant cannot claim an expectation of privacy when another party permits the police to monitor the conversation.\textsuperscript{139} Thus, neither situation results in a constitutional violation. As a result of \textit{White}, a majority of states have followed the federal rule that forms of consensual eavesdropping do not constitute an unreasonable search or seizure.\textsuperscript{140}

\textsuperscript{134} \textit{Id.} at 157-58, 519 A.2d at 856-57. The New Jersey court also predicted the eventual demise of the good-faith exception under federal law: "In our view, erosion of the probable-cause guarantee will be a corollary to the good-faith exception. We think it quite possible that the damage to the constitutional guarantee may reach a level as to cause the Court to reconsider its experiment with the fourth amendment." \textit{Id.} at 159, 519 A.2d at 857.

\textsuperscript{135} 401 U.S. 745 (1971) (plurality opinion).

\textsuperscript{136} \textit{Id.} at 747.

\textsuperscript{137} \textit{Id.} at 751.

\textsuperscript{138} 389 U.S. 347 (1967).

\textsuperscript{139} It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here.

Several states, however, have sharply diverged from the federal rule. In People v. Beavers, the Michigan Supreme Court held that electronic surveillance of a conversation between a police informant and the defendant violated the defendant's constitutional right to privacy. The Michigan court was persuaded by the reasoning of Justice Harlan's dissent in White. Justice Harlan had argued that the simultaneous transmission of a conversation to a third party by a participant could only be justified if a valid search warrant had been issued. The Michigan court concluded that this position better expressed the spirit of the Michigan constitutional protection against unreasonable searches and seizures than the majority holding in White. Therefore, using its own "reasonable expectation of privacy" analysis, the Michigan court found that a person in conversation with another party did not lose his or her expectation of privacy merely because the conversation might be monitored. Because the circumstances in Beavers did not justify a departure from the warrant requirement, even though accomplished with the consent of a participant, the surveillance was per se unreasonable under the Michigan Constitution.

In 1978, three more states rejected the federal rule established in White: New Hampshire, Montana, and Alaska. Most re-

U.S. 805 (1975); State v. Olson, 299 N.W.2d 29 (Minn. 1980), cert. denied, 449 U.S. 1132 (1981); State v. Engelmaier, 653 S.W.2d 198 (Mo. 1983).
142 Id. at 564-65, 227 N.W.2d at 514-15.
143 Id. at 564, 227 N.W.2d at 514.
144 Id. The Michigan constitutional provision against unreasonable searches and seizures is virtually similar to the fourth amendment. Id. at 564 n.4, 227 N.W.2d at 514 n.4.

145 "A party speaking in private conversation with another . . . has not 'knowingly expose[d] this conversation to the public' because an unknown party may be surreptitiously hearing every word being spoken." Id. at 565-66, 227 N.W.2d at 515 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).
146 Id. at 566-67, 227 N.W.2d at 515-16.

The Beavers case serves as a useful reminder that the dissenting opinions in U.S. Supreme Court cases may serve as useful precedent in the state constitutional arena.

147 In State v. Ayres, 118 N.H. 90, 383 A.2d 87 (1978), the New Hampshire Supreme Court declared that the state wiretapping statute prohibited warrantless consensual monitoring, except in the limited instance where the conversation is taped for the protection of an undercover police officer. Id. at 92, 383 A.2d at 88. The court rejected the State's contention that since the monitoring of the conversation was permissible, so was its recording and use at trial. Id. Instead, the court surmised that the legislature did not intend that monitored conversations be recorded and used later as evidence, unless a prior warrant had been obtained. Id. Apparently the court was wrong. Legislation now requires courts to admit conversations recorded pursuant to the undercover-officer exception. See State v. Kilgus, 128 N.H. 577, 589-90, 519 A.2d 231, 239-40 (1986).
cently, the Florida Supreme Court, in *State v. Sarmiento*,\(^{150}\) excluded testimony of officers who had electronically monitored an incriminating conversation even though a state statute purportedly permitted such monitoring.\(^{151}\) The court held that although a defendant might reasonably expect that another party to a conversation might later reveal it, a defendant nevertheless has a reasonable expectation that no one other than those present at a conversation in the defendant’s residence is listening to the conversation.\(^{152}\) Therefore, Florida’s statute authorizing electronic eavesdropping could not constitutionally authorize consensual monitoring in one’s home.\(^{153}\) The court’s prohibition, however, did not survive long. Six years after *Sarmiento*, the Florida electorate enacted a constitutional provision requiring Florida courts to construe the state constitutional prohibition against unreasonable searches and seizures in

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\(^{148}\) *State v. Brackman*, 178 Mont. 105, 582 P.2d 1216 (1978), required the Supreme Court of Montana to reconcile its state constitutional provision protecting the individual’s right to privacy with its prohibition against unreasonable searches and seizures. Significantly, the court determined that a showing of minimal probable cause sufficient to obtain a warrant did not establish a compelling state interest overcoming the individual’s privacy right. *Id.* at 116, 582 P.2d at 1222. Because the Montana court found that there was no compelling state interest for the consensual participant monitoring in this case, it affirmed a lower court’s suppression of a taped conversation between the defendant and the consenting participant. *Id.*

\(^{149}\) In *State v. Glass*, 583 P.2d 872 (Alaska 1978), modified, City of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984), the Alaska Supreme Court relied on the state constitution’s privacy provision to require officers to obtain search warrants before conducting electronic monitoring. *Id.* at 879. The court reserved judgment on whether the presence of exigent circumstances could ever justify warrantless monitoring. *Id.* at 881.

In a later case, the court held that individuals have no reasonable expectation of privacy in the contents of their conversations with uniformed police officers. City of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984). As a result, the trial court properly admitted evidence of the monitored conversation obtained without a warrant. *Id.* at 129.

\(^{150}\) 397 So. 2d 643 (Fla. 1981).

\(^{151}\) *Id.* at 645.

\(^{152}\) *Id.*

\(^{153}\) “[I]nsolar as that statute authorizes the warrantless interception of a private conversation, conducted in the home, it is unconstitutional and unenforceable.” *Id.* (emphasis in original).

The Florida Constitution’s clear language protecting conversations, coupled with its provision against unreasonable searches and seizures, provided a “reasonable expectation of privacy” in conversations conducted in the home. “The home is the one place to which we can retreat, relax and express ourselves as human beings without fear that an official record is being made of what we say by unknown government agents at their unfettered discretion.” *Id.* (quoting Sarmiento v. State, 371 So.2d 1047, 1051 (Fla. Dist. Ct. App. 1979)).
conformity with the federal fourth amendment. Thus, the legislature and the electorate once again demonstrated that state constitutional change can be undone quickly, where the amendment process is loose and unconstrained.

G. Right to Counsel—Preindictment Lineups

The sixth amendment to the United States Constitution grants an accused the right to counsel in all criminal proceedings. While this right has been extended to persons accused in state criminal prosecutions through the fourteenth amendment, federal and state courts differ as to at what point the right to counsel attaches.

In U.S. v. Wade and Gilbert v. California, the United States Supreme Court considered whether the right to counsel applied to identification lineups conducted after criminal indictments had been returned against a defendant. Emphasizing that an identification lineup constitutes a critical stage in criminal proceedings, the Court held that the sixth amendment guaranteed the assistance of counsel at postindictment lineups. Moreover, noting that similar dangers infected preindictment lineups, the Court hinted that the right to counsel might apply regardless of whether the lineup took place before or after the indictment issued.

Four years later, however, in Kirby v. Illinois, the Court expressly refused to extend the Wade and Gilbert rationale to pre-
indictment lineups. Because sixth amendment rights did not attach until criminal proceedings were initiated, the government would not be required to permit or provide counsel in situations occurring before the commencement of criminal proceedings, such as preindictment lineups.

While the majority of states have chosen to follow Kirby, several states have relied on their own state constitutions to extend the right to counsel to preindictment lineups. Michigan, for example, in People v. Jackson, granted suspects the right to representation at all identification procedures, both before and after commencement of criminal proceedings. Under the Michigan Constitution, the Michigan Supreme Court was authorized to establish rules of evidence regulating judicial proceedings in state courts. Therefore, the court was free to continue following its broad reading of Wade rather than adopt the limitations on the right to counsel developed in Kirby.

In Commonwealth v. Richman, the Pennsylvania Supreme Court reached the same result without directly relying on its state constitution. Instead, the Pennsylvania court interpreted Kirby to permit states to determine when judicial proceedings actually "commenced." Under this view, Kirby's focus on the indictment as the key to determining when sixth amendment rights attach did not...
bind state courts. Consequently, the *Richman* court held that under Pennsylvania law criminal proceedings "commence" with an arrest. Thus, the sixth amendment right to counsel would apply to all postarrest, preindictment lineups.

The Supreme Courts of Alaska and California have likewise adopted a right to counsel at the preindictment stage, citing a stronger right to counsel under their own constitutions.

**H. Death Penalty**

The framers of the Constitution accepted capital punishment as a part of America's legal heritage. In fact, the constitutionality of capital punishment was generally accepted and unchallenged in the courts until the early 1970s. It was not until 1972 that the Supreme Court held the death penalty statutes of Georgia and Texas unconstitutional in *Furman v. Georgia*. According to *Furman*, the imposition of the death penalty in those consolidated appeals constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments of the Constitution.

Within four years of the *Furman* decision, the federal government and thirty-five states enacted new death penalty statutes.

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171 "Kirby does not establish an all-inclusive rule; rather, the line to be drawn depends upon the procedure employed by each state. . . . We are convinced that it would be artificial to attach conclusive or significance to the indictment in Pennsylvania." *Id.*

172 *Id.* (citing *Commonwealth v. Whiting*, 439 Pa. 205, 266 A.2d 738, cert. denied, 400 U.S. 919 (1970)).

173 *Commonwealth v. Richman*, 458 Pa. at 172, 320 A.2d at 153. Moreover, it is immaterial whether the particular arrest triggering the right to counsel occurred with or without a warrant. *Id.* at 172-73, 320 A.2d at 353-54.

174 See *Blue v. State*, 558 P.2d 636, 642 (Alaska 1977) (holding that unless providing counsel would unduly interfere with the investigation of a crime, a defendant in police custody is entitled, under the Alaska Constitution, to have counsel present at a preindictment lineup); *People v. Bustamante*, 30 Cal. 3d. 88, 100, 634 P.2d 927, 935, 177 Cal. Rptr. 576, 584 (1981) (condemning the *Kirby* distinction between preindictment and post-indictment lineups as "wholly unrealistic").


176 See *id.* at 176-79.


178 *Furman v. Georgia*, 408 U.S. at 239-40.

179 See *Gregg v. Georgia*, 428 U.S. at 179-80 & nn.23-24; see also *Stein, Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point In Pulling So Tight," 15 Rutgers L.J. 443, 445 (1984).*
Under *Gregg v. Georgia*, decided in 1976, these statutes survived as constitutional alternatives to the laws struck down in *Furman*. Although *Furman* forbade sentencing procedures which failed to remove the possibility of arbitrary discrimination, carefully drafted statutes could "ensure a bifurcated proceeding [by] which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information," thus allaying these concerns. As a result, the majority of states today permit the imposition of the death penalty where the sentencing authority strictly adheres to constitutionally mandated procedures.

After *Furman*, using their own constitutions, California and Massachusetts responded by striking down death penalty statutes as unconstitutional per se. Just as quickly, the voters in both states sought to restore the death penalty by amending their state constitutions to specifically allow capital punishment, thus creating a tug-of-war between the legislature and the judiciary.

In *Commonwealth v. Colon-Cruz*, the Supreme Judicial Court of Massachusetts added an unexpected twist by striking down the postamendment death penalty legislation a second time. Although the amendment prevented the court from construing any provision

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181 Id. at 195.
182 Id. The articulated standard would not inevitably satisfy *Furman*’s prohibition against imposing the death penalty in an arbitrary and capricious manner. Accordingly, the Court will examine each death penalty statute individually. Id. Approximately 3,100 people had been sentenced to death under post-*Furman* statutes as of May 1, 1984. See Greenberg, *Capital Punishment as a System*, 91 *Yale L.J.* 908, 918 (1982). However, only twenty-one people actually were executed under these statutes between 1972 and 1984. Id. at 925. Nevertheless, the number of executions per year has been increasing. Streib, supra note 179, at 482-83.
183 Alaska, Hawaii, Maine, Michigan, Minnesota, West Virginia, Wisconsin, and the District of Columbia authorize life imprisonment as their maximum sentence.
of the state’s constitution as forbidding the death penalty, it did not prevent the court from invalidating the death penalty statute on other constitutional grounds. Because the 1982 statute permitted the imposition of a death sentence only after a guilty verdict rendered by a jury, it impermissibly burdened the state constitutional right against self-incrimination and the right to a jury trial. Thus, the court declared the death penalty statute unconstitutional once again.

The recent history of death penalty legislation in Massachusetts and California serves to underscore the ever-present threat of constitutional amendment, where citizens and legislatures disapprove of extreme shifts by their courts under the banner of state constitutionalism. This resort to checks-and-balances is likely to become much more pronounced as state constitutional decision making increases.

J. Trial by Jury

Originally guaranteed by the Magna Carta, the right to trial by jury was one of the most revered rights of every Englishman. Consequently, after separating from England many states incorporated the right to trial by jury into their early constitutions. At the same time, in England and in the states, courts enforced a vast body of statutory provisions, constituting “petty” or minor offenses, through summary procedures. In these cases defendants were tried before a judge without a jury.

Article III of the United States Constitution provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .” The sixth amendment mandates that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” These provisions, as applied to the states through the fourteenth amendment, thus require that states afford defendants accused of serious crimes the right to trial by jury, while permitting states to deny such a right to

188 Id. at 158-59, 470 N.E.2d at 121-22.
189 Id. at 163-71, 470 N.E.2d at 124-29. The court noted the additional burden to these rights because under Massachusetts law a defendant in a capital case may not opt for a trial before a judge. Id.
190 White, Commentaries of the Constitution of Pennsylvania 66 (1907).
191 Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guarantees of Trial by Jury, 39 Harv. L. Rev. 917, 920 (1926).
192 U.S. Const. art. III, § 2, cl. 3.
193 U.S. Const. amend. VI.
“petty” offenders.194

In Baldwin v. New York,195 the U.S. Supreme Court distinguished “petty” from “serious” offenses for purposes of the sixth amendment right to trial by jury. Reasoning that the benefits derived from speedy and inexpensive nonjury adjudications could outweigh the individual’s right to trial by jury, the Court concluded that “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”196

Presently, a few states decline to accept Baldwin’s invitation to refuse defendants accused of minor offenses the right to a jury trial. The Supreme Court of Alaska, in Baker v. City of Fairbanks,157 concluded that substantial policy reasons required that the state extend the right to a jury trial to all criminal prosecutions.198 Alternatively, West Virginia took the approach that the right to trial by jury attaches whenever a defendant is accused of a criminal offense which may result in incarceration.199 At least five other states have carved out different paths under their own constitutions.200

The Federal Constitution permits states to exercise limited discretion in determining the size of juries. In Williams v. Florida,201 the United States Supreme Court concluded that the framers of the Constitution did not attach special significance to the number twelve.202 In fact, twelve-member juries were simply a historical accident. Consequently, the court held that a six-member jury is constitutionally permissible in all but capital cases.203 The Court reached the same conclusion regarding the power of federal courts to limit jury size in Colgrove v. Battin.204

State courts have responded to Williams in three ways. Some state courts have held that their state constitutions mandate twelve-

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196 Id. at 69 (citation omitted).
198 Id. at 394, 401.
202 Id. at 88-90.
203 Id. at 192-03.
204 413 U.S. 149, 158-60 (1973).
member juries.205 Others have concluded that twelve-member juries are not constitutionally mandated.206 Finally, where the state constitutions specifically address the reduction or maintenance of jury size, courts have followed these express requirements.207

In In re Advisory Opinion to the Senate,208 the Supreme Court of Rhode Island concluded that the Rhode Island Constitution mandated twelve-member juries. The court stressed that the term “jury” had to be accorded the significance which attached to it at the time the state constitution was drafted.209 Because twelve jurors had been seated in Rhode Island courtrooms since the 1600s, the court concluded that the “petit jury referred to in our state's constitution means a panel of twelve.”210

Similarly, the New Hampshire Supreme Court, on state constitutional grounds, refused to dilute the right to a twelve-member jury trial.211 Noting the clear language of the New Hampshire Constitution, the court declared “that progressively smaller juries are less likely to foster effective group deliberations,” leading “[a]t some point, . . . to inaccurate fact finding and incorrect application of the commonsense of the community to the facts.”212 The justices concluded “that the vitality of [the twelve-member jury] remains today, especially in light of the number of empirical studies that have ques-


209 Id. at 854-55.

210 Id. at 854.


212 Id. at 492, 431 A.2d at 136 (quoting Bailey v. Georgia, 435 U.S. 223, 223 (1978)).
tioned the impact of the six-member jury on our court system.\textsuperscript{213}

While the above states have determined that their constitutions required twelve-member juries, other states have followed the U.S. Supreme Court's historical analysis and concluded that their constitutions permit some flexibility in jury size. For example, the Supreme Court of Indiana approved legislation permitting six-member jury trials in civil and criminal cases.\textsuperscript{214} Utilizing a different approach, the Supreme Judicial Court of Massachusetts upheld the constitutionality of a bill permitting six-member juries in prosecutions where the defendant could not be incarcerated in a state prison.\textsuperscript{215}

Thus, after \textit{Williams}, states have adopted a wide range of approaches in determining whether the legislature can deviate from traditional twelve-member juries, under their own constitutions.

\section*{J. Double Jeopardy}

\subsection*{1. Same-Evidence vs. Same-Transaction Test}

The double jeopardy clause of the fifth amendment of the United States Constitution\textsuperscript{216} provides three essential protections for a criminal defendant: (1) a prohibition against a second prosecution of the same offense following a conviction, (2) a prohibition against a second prosecution of the same offense following an acquittal, and (3) a prohibition against multiple punishment for the same offense.\textsuperscript{217}

The U.S. Supreme Court, in \textit{Blockburger v. U.S.}\textsuperscript{218} and \textit{Brown v. Ohio},\textsuperscript{219} developed the “same evidence test” to determine whether two or more crimes constitute the same offense.\textsuperscript{220} This test pro-

\textsuperscript{213}Id. at 483, 481 A.2d at 137.


\textsuperscript{216}U.S. Const. amend. V provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

\textsuperscript{217}\textit{E.g.}, \textit{Pearce v. North Carolina}, 305 U.S. 711, 717 (1969); see also 4 W. BLACKSTONE, \textsc{Commentaries} *335-38 (discussing the common-law basis of pleas barring retrial following conviction or acquittal).

\textsuperscript{218}284 U.S. 299 (1932).

\textsuperscript{219}437 U.S. 101 (1982).

\textsuperscript{220}The Court originally developed the same-evidence test to clarify when multiple punishments are imposed for the same offense. \textit{Blockburger v. U.S.}, 284 U.S. at 304.
vides that where the same act or transaction constitutes a violation of two distinct statutory provisions, the state may prosecute and punish the defendant for only one of the the statutory violations unless each statute requires proof of a fact that the other does not. 221 Hence, if one additional fact must be proven to establish each offense, the two may not be prosecuted separately without violating the double jeopardy clause. 222

According to many commentators, the same-evidence test is inconsistent with the objectives of the double jeopardy prohibition. 223 Frequently, a single criminal episode violates several statutory provisions, thereby creating the opportunity for successive prosecutions and multiple punishments. 224 As a result, the number of substantive offenses that may arise from a criminal transaction increases markedly, resulting in a decrease in double jeopardy protection.

Notwithstanding this criticism, the same-evidence test is followed by the majority of states. 225 However, some state courts have developed alternative approaches to better ensure double jeopardy protection.

The most common substitute for the same-evidence test is the "same-transaction test." This test requires that all charges arising out of conduct constituting a single criminal act, occurrence, episode, or transaction be tried in a single proceeding. 226 Courts frequently focus on the defendant's purpose in undertaking the criminal activity to delineate the scope of a single transaction. For example, where a defendant has one objective and commits several crimes in preparing for, or attaining that objective, the government may initiate only one prosecution even if the defendant committed several statutory violations in the course of that single criminal act or transaction. 227

Proponents of the same-transaction test assert that it best fulfills

Many years later, the Court applied this same test to determine when a defendant is prosecuted more than once for the same offense. Brown v. Ohio, 432 U.S. at 166.


223 See, e.g., Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L.J. 513 (1949); Comment, Twice in Jeopardy, 75 Yale L.J. 262 (1965).


225 Id. at 170; see also Comment, 43 Notre Dame Law. 1017, 1019 (1968).


the purposes behind the double jeopardy clause. For instance, it is consistent with the purpose of bringing finality to criminal proceedings. Also, it prevents prosecutors from prosecuting a defendant on distinct charges before alternative sentencing authorities to get the strictest possible sentence. As a result of these considerations, many state courts have adopted this test under the double jeopardy clauses of their state constitutions, asserting that it best promotes justice, economy, and convenience.

In *Commonwealth v. Campana,* the Pennsylvania Supreme Court adopted a “single criminal episode” test to ensure double jeopardy protection. *Campana I* and its progeny, *Campana II,* created a rule of compulsory joinder requiring that criminal offenses arising from the same criminal episode be disposed of in one prosecution. Pennsylvania’s legislature thereafter codified this test, making it a statutorily mandated guaranty.

The Oklahoma Supreme Court, in *Johnson v. State,* recognized that much of the confusion about the double jeopardy concept arises from the injustice of applying either the same-evidence or the same-transaction test to the exclusion of the other. The court noted that the double jeopardy clause protects against two distinct abuses: subjecting defendants to multiple prosecutions and imposing multi-

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228 See Kirchheimer, *The Act, the Offense and Double Jeopardy,* 58 Yale L.J. 513, 534 (1949).


232 Id. at 252-53, 304 A.2d at 441.


pie punishments for a single offense.\textsuperscript{237}

According to the Oklahoma court, the same-transaction test best protects defendants against the threat of multiple trials, while the same-evidence test provides the most effective assurance that a defendant will not receive multiple punishments for the same criminal act.\textsuperscript{238} Thus, the Oklahoma court adopted an amalgamation of the two tests in order to provide maximum protection to the criminal defendant.

In this difficult, ambiguity-ridden area of the law, state courts have thus made positive steps toward improving a federal standard which spawned confusion from its inception. The state constitutional approaches are wide ranging,\textsuperscript{239} but each attempts to bring more clarity and fairness to the proscription against double jeopardy, which has engendered a great deal of confusion at the federal level.

2. \textit{Successive State and Federal Prosecutions}

Defendants facing prosecution for the same criminal activity in both federal and state courts may also raise double jeopardy objections. The two leading Supreme Court cases detailing the federal approach to this situation are \textit{Barkus v. Illinois}\textsuperscript{240} and \textit{Abbate v. United States}.\textsuperscript{241} In \textit{Barkus}, the petitioner was tried and acquitted in a federal court for violation of a federal statute which made it a crime to rob a federally insured savings and loan association.\textsuperscript{242} On substantially the same evidence, the defendant was later tried and convicted in an Illinois state court for violation of an Illinois robbery statute.\textsuperscript{243} In \textit{Abbate}, decided the same day as \textit{Barkus}, the situation was reversed. There the Supreme Court upheld a federal conviction after the petitioners had plead guilty to a similar state offense.\textsuperscript{244} In both cases the Supreme Court based its decision upon the dual sovereignty notion that the state and federal governments are free to enforce their own criminal laws as they deem

\textsuperscript{237} Id. at 1141.
\textsuperscript{238} See id. at 1144.
\textsuperscript{240} 359 U.S. 121 (1959).
\textsuperscript{241} 359 U.S. 187 (1959).
\textsuperscript{242} Barkus v. Illinois, 359 U.S. at 121-22.
\textsuperscript{243} Id. at 122.
\textsuperscript{244} Abarte v. United States, 359 U.S. at 195-96.
appropriate.245

While the Supreme Court has not overturned Bartkus, the Department of Justice has mooted this aspect of the double jeopardy debate by adopting and following a policy barring federal prosecutions which duplicate state proceedings.246 Nonetheless, a number of states continue to follow Bartkus, relying either on their own independent analysis of state and federal constitutional provisions,247 or specifically citing Bartkus.248

Other state courts, on the other hand, have sharply criticized Bartkus.249 Moreover, the legislatures in nineteen states have specifically limited or rejected the results of Bartkus’ dual sovereignty analysis.250 The Pennsylvania Supreme Court played a significant role in this development with its decision in Commonwealth v.


246 Seven days after Bartkus and Abbate, Attorney General William Rogers issued a memorandum outlining the procedure for prosecuting criminal cases where the defendant had already been prosecuted by the state. Department of Justice Press Release, Apr. 6, 1959, 27 U.S.L.W. 2509 (1959). The memorandum attempted to ensure that the Bartkus-Abbate rule would be used sparingly. See Petite v. United States, 361 U.S. 529, 530-31 (1960) (per curiam) (vacating a suborning perjury conviction on a motion by the Department of Justice after the petitioner plead nolo contendere to conspiring to make false statements to an agency of the United States at a hearing). Significantly, the Court did not offer an opinion on the defendant’s double jeopardy claim. Id. Therefore, Bartkus and Abbate remain good law.


250 Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Minnesota, Montana, New York, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, and Washington have such legislation.
In *Mills*, the court announced that unless Pennsylvania's interest in prosecuting an individual differed substantially from the federal interest, an initial federal prosecution barred later prosecution by the Commonwealth. The court went on to emphasize the failure of the *Barkus* majority to adequately consider the individual's interest in not being tried twice for the same offense. Subsequently, Pennsylvania's legislature demonstrated its approval of the court's rationale by codifying the *Mills* holding.

Other states have followed the "interest of the defendant" approach developed by the Pennsylvania court in *Mills*. For example, in *People v. Cooper*, the Michigan Supreme Court held that the *Mills* approach best accommodated the interests of the defendant and the state. The court identified several factors which could be considered in deciding whether a federal prosecution satisfied the state's interest. These included whether "maximum penalties of the statutes involved are greatly disparate, whether some reason exists why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction's interests in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are more substantive."

Relying upon its state constitution, the New Hampshire Supreme Court reached a similar result in *State v. Hogg*. The court held that the purpose of New Hampshire's double jeopardy provision was to protect the individual. Therefore, the individual's interest, rather than the interest of the sovereign, would control in determining whether state prosecutions were barred.

**Conclusion**

The future of state constitutional law in the area of criminal procedure can perhaps best be summarized by a footnote appearing in *Batson v. Kentucky*, a case decided by the U.S. Supreme Court in 1986. In *Batson*, the Court held that a defendant could establish
violation of the equal protection clause where the state had exercised its peremptory challenges to exclude members of a cognizable racial group in a single case. In doing so, the Court overturned the crippling test established in Swain v. Alabama. Swain required a defendant to demonstrate that the State had systematically used peremptory challenges, over time, to repeatedly exclude members of a certain racial group. As critics predicted, defendants could not meet this burden. Consequently, the Swain test provided no constitutional protection whatsoever. By holding that systematic exclusion of a racial group in a single case violated equal protection and the right to an impartial jury, Batson made it possible for defendants to enforce their sixth and fourteenth amendment rights.

For state constitutional law purposes, the significance of the Batson decision is buried in a footnote at the beginning of the Court's opinion. In that inconspicuous footnote, the Supreme Court impliedly acknowledged that decisions of the California, Delaware, Florida, and New Mexico courts under their own state constitutions had paved the way for the Court's ultimate reconsideration and reversal of the Swain standard. Thus, in Batson, state consi-

262 "No state shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, § 1.
263 Batson v. Kentucky, 476 U.S. at 96. To prove such discrimination in a particular case, the Batson Court declared that a defendant must show that he or she is a member of a cognizable racial group, and that the prosecutor used peremptory challenges to remove members of the defendant's race. The defendant must also show that the facts and other relevant circumstances of the case raise an inference that the use of peremptory challenges was prompted by considerations of race. Id. The trial judge must then decide if the defendant has made a prima facie showing of purposeful discrimination in the exercise of peremptory challenges. Id. at 96-97. If the trial judge should decide that a prima facie showing has been made, then the burden shifts to the prosecution to offer a neutral explanation for the challenge of the jurors. Id. at 97. If the prosecutor articulates a neutral explanation, the trial court then must determine if the defendant has established purposeful discrimination. Id. at 98.
265 Id. at 227. The Court stated that "[i]n such circumstances [where there was a systematic record of abuse] . . . it would appear that the purpose of the peremptory challenge are [sic] being perverted." Id. at 224. Analyzing the record in Swain, however, the Court found no record of a systematic use of peremptory challenges based on race and dismissed the petitioner's claims. Id.
267 Batson v. Kentucky, 476 U.S. at 82 n.1. Justice Powell wrote: "Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment." Id. (citations
tutional law developments significantly impacted federal constitutional analysis and reform.

In such small triumphs, the future of state constitutional law rumbles with possibilities. In greater measure, the decisions rendered by state courts under their own constitutions are fulfilling the prescient words of Justice Brandeis, that states must serve as laboratories—268 as jurisprudential centers of experimentation and improvement. With gradual precision over the process, state constitutional law is inching away from its initial status as a harsh reaction to Supreme Court decisions which a small group of active "liberals" found to be unpalatable, to a tool available to liberals, conservatives, and moderates alike, who may simply seek to build more workable, sturdy rules of law.

The real test of state constitutional law, as it feels its way into the 21st century, will be the extent to which liberals, conservatives, prosecutors, defense lawyers, and state court judges, of various ideologies, are able to dig into the same unique storehouse of rich American history and homegrown justice embodied in the state constitutions, and create rules which are not only different, but which are better suited to the particular citizens of the particular state who occupy their own particular niche in the grand federal experiment.